

Inclusive Juries

— Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision Report

VICTORIAN
**LAW
REFORM***
COMMISSION

July 2022

**A Community
Law Reform
Project**

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A note on the cover design

The cover design represents the wider community in relation to the central set of twelve selected members of a jury. Highlighted throughout the community and within the jury itself are community members from the groups who are the subject of this inquiry.

This office is located on the land of the Traditional Custodians, the people of the Kulin Nations.

We acknowledge their history, culture and Elders both past and present.

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Report

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Preface

The clear message which has emerged from this enquiry is that enabling people who are deaf, hard of hearing, blind or have low vision to serve on juries is well overdue. Victorians can be proud that the laws of their state are generally up to date and reflect the outlook of the community. However, the research set out in this report shows that by effectively excluding those who are deaf, hard of hearing, blind or have low vision from jury service, the law in Victoria is out of step with local community expectations, is inconsistent with international standards, and lags behind many countries in which inclusive juries have been a reality for many years.

This report was generated by the Commission itself as a community law reform project pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000*. The reader will, I am sure, be struck by the depth of research and the comprehensiveness of the discussion. Whilst this subject has been investigated by other law reform agencies, none has provided as wide-ranging a survey as this report. That is primarily the result of the efforts of Emma Cashen, team leader, and Phoebe Lindner, research and policy officer. Not only have they worked particularly hard, but they have had to contend with the adverse conditions produced by the coronavirus (COVID-19) pandemic, including home schooling and conducting consultations remotely. Despite these challenges, nothing deterred Emma and Phoebe from chasing down every piece of relevant information and crafting it into this first-rate work. I also thank Sarah Sacher, research and policy officer, and Grace Bramwell, researcher, who worked on the earlier consultation paper.

Until the final stage, the progress of the report was overseen by a Division of the Commission which I constituted under section 13(1)(b) of the *Victorian Law Reform Commission Act 2000*, comprising Liana Buchanan, the Hon. Jennifer Coate AO, Bruce Gardner PSM, Gemma Varley PSM and me. Upon their appointments Kathleen Foley SC and Dr Vivian Waller joined the Division. In the end, the report is the work of all nine Commissioners. Those who were not part of the Division—Professor Bernadette McSherry and Dan Nicholson—nonetheless commented on the final draft and made extensive and valuable suggestions. The work of the Division, and the other Commissioners, on this reference turned out to be particularly onerous because the timing of critical moments intersected with heavy workloads relating to concurrent references. Despite this, they engaged closely with this report and made many thoughtful and detailed comments on the drafts. Their contributions were all made in a spirit of collegiality, cooperation, and good humour.

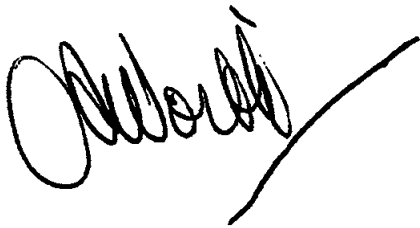
Professor Emeritus Ron McCallum AO was a Special Advisor for the report. His contribution has been very significant. Not only has he devoted much time and energy to commenting on the various drafts, but he has brought a distinctive and critical perspective to the work of the team and the Commission because of his own life experience as a person blind from birth who has achieved so much. He is the first totally blind person to be appointed a professor in Australia and to be the Dean of the Law School, University of Sydney. For many years he was the Chair of the United Nations Committee on the Rights of Persons with Disabilities. I thank him for his generosity, wisdom, and guidance. It is fitting that his voice is reflected in this report because he has been such a prominent advocate for the rights of people with disabilities for a very long time.

This report is built on the foundation of the contributions made by all those people with whom we consulted. Foremost among them were the organisations which advocate for people who are deaf or hard of hearing, blind or who have low vision. I hope their sense of frustration about the current inequitable position comes through clearly in this report. We again called for assistance from representatives of the courts and lawyers who deal with juries on a regular basis. I acknowledge their generosity in spending time with us after their workday duties were finished. We also leant heavily on the experience of the Victorian Juries Commissioner who provided much important information.

The administration of the Commission continues behind the scenes whilst the consultation and research for the report proceeds. The CEO, Merrin Mason PSM, provided that steady hand and wise counsel which is essential for the proper working of the system. She was assisted by the administrative staff: Jeniffer Joyner, Monika George, and Janis Dunk.

The final processes in the production of the report, including editing, proofreading and arranging for layout and printing, are extremely labour-intensive and the team could not have completed this phase without the assistance of Nick Gadd, Communications Manager and Gemma Walsh, Information and Communications officer. Other staff of the Commission—Emma Larking, Madeleine Ulbrick, Natalie Lilford and Marcus Hickleton, who had just finalised the report into stalking, were of great assistance at this final stage.

I trust that you will take the strong human rights message from this report and enjoy reading it.

A handwritten signature in black ink, appearing to read 'A M North', with a long, sweeping horizontal stroke extending to the right.

The Hon. A M North QC

Chairperson

Victorian Law Reform Commission

July 2022

Terms of reference

The Victorian Law Reform Commission will consider what changes to legislation and practices should be made to enhance access for people who are deaf, hard of hearing, blind or have low vision who wish to serve as jurors in Victoria.

The *Juries Act 2000* (Vic) provides a list of people who are ineligible to serve as jurors. Among those excluded are persons with 'a physical disability that renders [them] incapable of performing the duties of jury service', and those who are 'unable to communicate in or understand the English language adequately'.

Although people who are deaf, hard of hearing, blind or have low vision are not expressly precluded from jury service, prohibitions on allowing interpreters or communication assistants into the jury room mean that, for many, such service would not be possible.

The project will examine the current legal framework to consider whether legislative change is required, what practical supports would be necessary, and whether there are specific circumstances in which such jury service should be limited.

In conducting this review, the Commission will have regard to:

- Relevant legal and practice developments in domestic and international jurisdictions.
- Current practice and statistics in Victoria relating to excusal and disqualification of people who are deaf, hard of hearing, blind or have low vision as jurors.
- The common law rule prohibiting any non-jurors from being present in jury deliberations (the 'thirteenth person' rule).
- The interaction with discrimination law and human rights in Victoria.
- The interaction with peremptory challenges and crown stand-asides.
- The resourcing and training implications for court and jury offices staff and judicial officers.
- The importance of a fair trial and confidence in the jury system.

The Commission will not consider:

- Whether people who cannot understand or communicate in English at all should be able to serve on juries.

Glossary

Accused	A person charged with a crime is called an accused in the Supreme and County Courts.
Affirmation	A secular verbal, solemn and formal declaration that can be made rather than taking an oath .
Audio description	A form of narration used to provide information about visual images for people who are blind or have low vision.
Auslan (Australian Sign Language)	A language developed by, and for, Australians who are deaf or hard of hearing. It is composed of precise hand shapes, facial expressions, and body movements, with its own syntax and grammar. ¹
Auslan interpreter	An interpreter who translates spoken and written English into Auslan and vice versa. They abide by a strict code of ethics and are obliged to respect confidentiality.
Ballot/random ballot	The random selection of prospective jurors by drawing cards out of a box. Prospective jurors are usually identified by number.
Braille	A form of written language for people who are blind, characterised by raised dots that can be felt with the fingertips.
Chambers	A judge's official office, often staffed by people assisting the judge, including the Judge's Associate .
Crown prosecutor	A representative of the Victorian or Director of Public Prosecutions (Cth) responsible for prosecuting indictable offences.
Demeanour evidence	The outward physical behaviour and appearance of a defendant or witness. Demeanour is not merely what someone says but the way it is said. Factors that contribute to an individual's demeanour include tone of voice, facial expressions, gestures, and carriage.
Disability awareness training	Training that seeks to challenge ingrained cultural and attitudinal barriers which perpetuate discrimination, and to provide participants with a general overview of the legislative framework that supports the inclusion of people with disability in Australia. ²

¹ Judicial College of Victoria, *Disability Access Bench Book* (Online Manual, 2016) 10, Glossary <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

² 'Introduction to Disability Awareness', *Disability Awareness* (Web Page) <<https://disabilityawareness.com.au/courses/introduction-to-disability-awareness/>>.

Discharge a juror	To release a juror from the jury after the jury has been sworn in.
Discharge of jury summons	To release a juror from their obligation to attend court in response to a summons.
Excuse	A reason for not being able to attend for jury service or to sit on the jury for a particular trial.
Foreperson	A foreperson is selected by the jury to communicate between the jury and the judge and to announce the verdict.
Hearing loop	Sound technology that produces a magnetic wireless signal which is picked up by a hearing aid to deliver sound without background noise and distortion directly to a person's ears. It is commonly used in public premises and buildings to assist people who are hard of hearing.
Impartiality	Without bias or prejudice.
Judge's Associate	A person employed to assist the judge in court and in chambers on legal matters and with case management, by acting as an intermediary between parties and the judge.
Juries Victoria	The organisation responsible for jury administration in Victoria.
Juror	A member of the jury .
Jury	A group of people from the community, selected as jurors to deliver verdicts. The jury is randomly selected from the jury panel .
Jury empanelment	The process of selecting the jury for a trial from the pool of persons summonsed for jury duty.
Jurykeeper	A person appointed by the court to accompany jurors where it is necessary to prevent people having access to the jurors or the jurors having access to others. The jurykeeper's role is to ensure there is no attempt to influence jury deliberations . They must take an oath or make an affirmation to uphold their responsibilities.
Jury deliberations	The process by which jurors discuss the case to arrive at a verdict in a trial.
Jury directions	Instructions provided by the judge to the jury about the legal principles which the jury is obliged to apply. These directions guide the conduct of jurors in reaching a verdict.
Jury panel	The small group of people randomly chosen from the jury pool from which a jury is selected.
Jury pool	The collective name for everybody attending the court for jury service on a given day.
Jury Summons	An official notification from Juries Victoria stating that a person is required to attend a specific court on a specific date to undertake jury service.
Oath	A verbal promise to tell the truth, usually made while holding a religious text (though this is not a necessity).

Order	A direction by a court or tribunal that is final and binding unless overturned on appeal.
Peremptory challenge	A challenge made by a party to a prospective juror to exclude them from the jury . A party is not required to provide reasons for making a peremptory challenge.
Procedural fairness	The requirement that legal proceedings are conducted in a fair manner. Procedural fairness requires that parties have the opportunity to be heard before a competent tribunal and have their disputes determined by an impartial decision maker.
Prospective juror/ potential juror	A person who has been summonsed to attend for jury service, but not yet selected for a jury.
Reasonable adjustments	In this report, this term means reasonable modifications employed to facilitate jury service by persons who are deaf, hard of hearing, blind or who have low vision. An example might be an Auslan interpreter , a disability aid, or changes to the way a courtroom is organised. See Chapter 13.
Stand aside	A challenge made by the Crown to exclude a prospective juror from the jury . No reasons for making this challenge need to be provided.
Subject groups	In this report, the Commission refers to people who are deaf, hard of hearing, blind or have low vision as people in the 'subject groups'.
Thirteenth person rule	The common law rule that only jurors (usually 12) may be present in a jury deliberation (in the jury room). A non-juror or '13th person' is not permitted in the jury room. This rule was re-affirmed by the High Court in 2016. ³ This rule is intended to keep the jury separate to preserve the confidentiality of the deliberation process.
Tipstaff	An assistant to a judge, who conducts some of the formal court processes and looks after the jury during the trial. A tipstaff can be sworn in as a jury keeper .
United Nations Convention on the Rights of Persons with Disabilities	The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 and entered into force on 3 May 2008. Ratified in Australia in July 2008, the CRPD sets out obligations for equality and non-discrimination, accessibility, and the right to live independently and be included in the community.

Executive summary

*People tell us constantly: 'You can't do this; you can't possibly do that'. But we are not offered the opportunity to try because of the current barriers to participation. We could bring a different perspective. No one asks us what we can do.'*¹—Participant in the Deaf Victoria consultation

- 1 This report recommends ways to remove barriers from current law and practice that prevent Victorians who are deaf, hard of hearing, blind or have low vision (whom we refer to in our report as 'the subject groups') from serving as jurors.
- 2 In the first part of the report, we set the scene for reform by explaining the barriers to service that people currently face and the international legal obligations that we should abide by. We consider how things are done overseas, where people who are deaf, hard of hearing, blind or have low vision have served on juries for years. We set out what people told us about wanting to serve as jurors.
- 3 The second part of the report (from Chapter 11) contains the Commission's recommendations for reform, and provides examples of the adjustments that could enable people in the subject groups to serve.

What is the problem with current law and practice?

*The public will only know what blind/visually impaired people are capable of when we show them what we can do. If the public don't have any contact with blind/visually impaired people, they don't know what tools are available to help blind people undertake the same tasks as sighted people. I always say: 'If you want to know how things work [for a blind person], ask me.'*²
—Participant in the Blind Citizens Australia consultation

- 4 Jury service is currently inaccessible because of a combination of two things. Firstly, there is no obligation in the *Juries Act 2000* (Vic) (the Act) to require the courts or the Juries Commissioner, responsible for administering the jury system through Juries Victoria, to provide adjustments. Those adjustments might include an Auslan interpreter, or a device that enables speech-to-text translations, or screen reading. Jury service might be accessible with adjustments, but they are generally not provided.

¹ Consultation 6 (Deaf Victoria and community participants).
² Consultation 1 (Blind Citizens Australia).

- 5 Secondly, a long-standing common law rule known as the '13th person rule' states that only jurors (usually 12 in a criminal case) may be present in the jury room. Therefore, a non-juror or '13th person', for example an Auslan interpreter, is not permitted in the jury room during deliberations.³ This rule is intended to keep the jury separate to preserve the confidentiality of the deliberation process.
- 6 This often leaves people who are deaf, hard of hearing, blind or have low vision with no option but to seek to be excused from jury service; or, they are deemed ineligible to serve by the Juries Commissioner. Additional barriers are likely to prevent Aboriginal people who are deaf, hard of hearing, blind or have low vision from serving as jurors.

Why does the law need to change?

The Court considers that supporting people in the subject groups to serve as jurors, where consistent with the accused's right to a fair trial, would advance the representativeness of juries and the community's confidence in the jury system.⁴—Supreme Court of Victoria

- 7 Jury duty is an important civic duty associated with active citizenship. Barriers to jury service in current law and practice are out of touch with community expectations, laws and policies about non-discrimination and the inclusion of people with disabilities in public life.
- 8 A broad cross-section of our community should be represented on our juries, with members bringing different views and experiences to deliberation. Making juries more representative is a key purpose of the Act.⁵
- 9 People who are deaf, hard of hearing, blind or have low vision want barriers to jury service removed. They want to be able to discuss with an official what they can and cannot do, and what adjustments they require to serve.
- 10 Australia has ratified the United Nations Convention on the Rights of Persons with Disabilities. Article 3(c) refers to the principle of 'full and effective participation and inclusion in society' of people with disabilities.⁶
- 11 The United Nations Committee on the Rights of Persons with Disabilities (the Convention Committee) has found that by failing to comprehensively assess a request for adjustments to facilitate jury service, Australia is breaching its obligations under international law.⁷
- 12 Victoria is lagging behind other comparable common law jurisdictions, where people have been serving as jurors with adjustments for many years.
- 13 In the United States, people with disabilities have served as jurors without controversy for over 30 years. In England and Wales, the courts have long had processes in place to provide reasonable adjustments for jurors in court (as long as a non-juror was not needed in the jury room in deliberations). A new law was introduced in April 2022 which limits the operation of the 13th person rule in England and Wales, and allows British Sign Language interpreters to work alongside deaf jurors in the jury room.
- 14 In 2018 the Australian Capital Territory became the first, and only, Australian jurisdiction to change its laws and practices to enable people in the subject groups (and others) to serve as jurors with reasonable adjustments.

3 *Lyons v State of Queensland* [2016] HCA 38, 10–11 [33], (2016) 259 CLR 518, 529–30 [33].

4 Submission 11 (Supreme Court of Victoria).

5 *Juries Act 2000* (Vic) s 1(b).

6 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3(c). Australia ratified the treaty on 17 July 2008: United Nations, 'Chapter IV 15 Human Rights: Convention on the Rights of Persons with Disabilities', *United Nations Treaty Collection* (Online Collection, 14 June 2022) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

7 See discussion in Chapter 6.

Upholding the right to a fair trial

- 15 While supporting reform, many people told us that change must not prejudice the right to a fair trial. The Commission agrees.
- 16 In many circumstances, reasonable adjustments will enable a person who is deaf, hard of hearing, blind or has low vision to perform the role of juror. This has been demonstrated in overseas practice and academic studies.
- 17 In rare situations, even with reasonable adjustments, a person from the subject groups may not be able to perform jury duty. This might happen because of the intersection between their disability, the adjustments they require, and the nature of evidence that is material to the outcome of a particular trial. We recommend that the trial judge make the final decision about whether a person can serve on the jury.

A new obligation in the Juries Act to provide reasonable adjustments

- 18 To ensure that reasonable adjustments are provided to people in the subject groups, the Act needs to be changed.
- 19 The Act should require the courts to direct that reasonable adjustments be provided where the court considers that the provision of those adjustments would enable a person to serve as a juror.
- 20 The factors the judge may consider in deciding whether reasonable adjustments can be provided should be listed in the Act, along with examples of possible adjustments.
- 21 The Act should limit the 13th person rule to enable Auslan interpreters and support persons to work alongside a juror in the jury room, subject to safeguards including an oath taken by Auslan interpreters or a support person to maintain confidentiality, not participate in or disclose deliberations and to interpret truthfully.

Changes to the practices and procedures of Juries Victoria and the courts

- 22 We have accepted the suggestion that the Commission should 'outline clearly, in a very practical way' how change can occur.⁸ The recommendations in this report aim to provide a practical road map for change from the start of the jury selection process to trial.
- 23 The finer details of implementation will need to be settled by the courts and Juries Victoria. They will need to work together to put the new provisions of the Act into practice. The aim is to ensure that, as recommended by the Convention Committee:
 - every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of [their] request for adjustment is carried out and all reasonable accommodation is duly provided to enable [their] full participation.⁹

The role of Juries Victoria

- 24 Juries Victoria should take the lead in arranging the provision of reasonable adjustments.
- 25 The jury eligibility form should ask people to identify if they require reasonable adjustments in order to serve as a juror. Juries Victoria should have early discussions with the potential juror about these adjustments and what will be expected of them as a juror. Potential jurors should be able to visit the court ahead of the summons date to discuss adjustments and to familiarise themselves with the court layout and accessibility.

⁸ Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).
⁹ Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) [9(b)(i)] ('*Beasley v Australia*').

- 26 The Juries Commissioner should make a recommendation to the court as early as practicable about the provision of reasonable adjustments. This recommendation will be guided by legislation, and by information gathered from the potential juror and the court, as well as information from judges' chambers about evidence that is likely to be material to the outcome of the upcoming trial.
- 27 The Juries Commissioner should have a new own motion power to defer a person's jury service, giving Juries Victoria more time to arrange adjustments if needed. We also recommend two new powers for the Juries Commissioner to hold a potential juror's ballot card out of the pool from which a jury panel is being drawn for a trial, where:
- the trial will be heard in an inaccessible courtroom
 - fair trial concerns arise because of the evidence that is material to the outcome of the specific trial.
- 28 In either of these situations, the person's ballot card would remain in the pool for panel ballots for other trials. The aim is to remove the barriers that prevent a person in the subject groups from advancing through the early steps of the jury selection process and reduce the likelihood that a judge will need to determine the matter in a hearing on the day of empanelment. These decisions by the Juries Commissioner should be appealable to the court.
- 29 If there are no concerns, the Juries Commissioner should arrange adjustments for the jury selection process and in readiness for trial.

The role of the trial judge

- 30 The final decision about jury service with reasonable adjustments should be made by the trial judge, when the potential juror attends court on their summons date, and is balloted to a panel for a specific trial.
- 31 In some situations, jury selection processes may need to be put on hold while the judge determines the matter in a short hearing with the potential juror. This will occur before the jury panel is brought into the courtroom.
- 32 If the judge decides that the potential juror will not be able to serve in that trial even with reasonable adjustments, the person should be returned to the jury pool to potentially serve on a different trial. The judge could also excuse a person under their summons if that is more appropriate. If a judge decides that adjustments can be provided, then the arrangements made by the Juries Commissioner will continue.
- 33 Information about the use of reasonable adjustments should be provided by the judge at different stages of the jury selection process to counsel, the court and the jury.

Accessibility officers, Auslan interpreters and support persons

- 34 Accessibility officer roles should be created to provide a potential juror with assistance, if they need it, to navigate the court building during the selection process and trial.
- 35 Auslan interpreters should undergo specialised training to interpret for a juror. Because Auslan interpreters are already highly trained, this additional training should not be onerous.
- 36 A person who is blind or has low vision may require support to access visual material in a trial. When audio description becomes more professionalised and regulated in Australia, audio describers may take on the support person role, with appropriate training.
- 37 Auslan interpreters and support persons should sign up to standards and a code of conduct, to be developed by the courts, outlining their role and responsibilities in jury work. They should also provide an oath to the court in relation to their duties and responsibilities and be liable to new penalties for breach of those duties.

- 38 Change may also be needed to the way that courtrooms are organised and how some trials are run to accommodate the use of reasonable adjustments. We recommend that there should be training for the judiciary and profession and protocols to ensure that this happens smoothly.

Challenges during the juror selection process

- 39 Parties and the Crown have a right to challenge the selection of a potential juror without giving reasons, by exercising respectively 'peremptory challenges' and 'stand asides'. These challenges aim to ensure that the accused receives a fair trial and to allow the accused to exercise some influence over the composition of the jury. While we hold concerns that these challenges may be used to prevent people from the subject groups from serving, we conclude that the best way to avoid the discriminatory use of these challenges is to educate legal professionals about how people from the subject groups can serve effectively with reasonable adjustments.

Excuse

- 40 People in the subject groups should continue to be able to be excused from jury duty for reasons connected to their disability. Disability in and of itself should not be a ground for excuse from service, unless the Juries Commissioner is satisfied that permanent excuse is appropriate.
- 41 The excuse process should not be overly burdensome. Juries Victoria should provide clear and accessible information about the excuse process.

Cultural change and education

- 42 Research indicates that some legal professionals may be apprehensive about reform and how change will work in practice. For reforms to be effective, these apprehensions will need to be addressed.
- 43 Legal professionals may have little contact or first-hand experience of working with or interacting with people from the subject groups and a poor understanding of how adjustments work in practice. Academic research examining competency to serve with adjustments and overseas practice may not be well known. Together with clear legislative guidance and a judicial assessment process for reasonable adjustments, we recommend:
- There should be disability awareness training for judges, lawyers, counsel and Juries Victoria. Training developed in partnership with people from the subject groups should have a practical focus and cover the range of reasonable adjustments and how they work in practice.
 - There should be professional development about how the new laws work in practice.
 - The courts and Juries Victoria should develop internal protocols to guide staff on the implementation of new laws.
- 44 Clear and practical information should be provided to the community about the operation of the new laws. This will encourage people in the subject groups to serve and reassure them about the process. Targeted information encouraging Aboriginal Victorians from the subject groups to serve is particularly important.

Funding these reforms and monitoring progress

- 45 There will be costs associated with implementing the recommendations in this report, but these costs are outweighed by the benefits of reform. Only a small number of trials are likely to be impacted, so we are confident that reforms can be implemented reasonably easily, without placing a large ongoing burden on the courts or Juries Victoria.
- 46 If the law is changed, data should be collected about the participation of people from the subject groups at all stages of the jury selection process, and published in the Supreme Court's annual report.
- 47 Subject to juror confidentiality requirements in the Act, information should also be collected about the experiences of people from the subject groups.
- 48 Information about the new laws and policies should be widely distributed to the Victorian community in accessible formats, including videos, printed information by Government and advocacy organisations, and on the Juries Victoria and court websites.
- 49 The new laws should be reviewed after five years of operation.

Recommendations

Chapter 11

1. The *Juries Act 2000* (Vic) (the Juries Act) should be amended to require that where a judge considers that reasonable adjustments would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror, the judge must direct that those adjustments be provided or direct that the Juries Commissioner provide them.
2. The Juries Act should be amended to provide that, in making a decision about the provision of reasonable adjustments, the judge may consider how the adjustments may affect the trial, the impact on court resources and any other issue that the judge considers relevant. The Act should also specify that the judge may be guided by any evidence that they consider relevant in making their decision.
3. The Juries Act should include a non-exhaustive list of possible adjustments that can be supplemented by regulation. The list of possible adjustments should include: Auslan interpreters; support persons; an assistance animal; and disability aids including technological aids that facilitate communication, for example, with speech-to-text software and screen reading programs.
4. The Juries Act should be amended to limit the operation of the 13th person rule to the extent necessary to allow interpreters or support persons in the jury room, as directed by the court.
5. Schedule 2 clause 3(a) of the Juries Act should not apply if a judge rules that reasonable adjustments can be provided to enable a person in the subject groups to serve as a juror.
6. The Juries Commissioner should be given a new own motion power in the Juries Act to defer jury service for a person in the subject groups to better enable the provision of reasonable adjustments.
7. The Juries Commissioner should be given a new power in the Juries Act to hold a person out of a ballot for a panel where a trial is to be heard in a courtroom that cannot accommodate reasonable adjustments that would enable that person to serve as a juror.
8. A decision by the Juries Commissioner to hold a person out of a ballot should be appealable under section 10 of the Juries Act to either the County Court or the Supreme Court. This matter should be dealt with in an urgent interlocutory hearing.
9. The Juries Act should be amended to provide that if a judge determines that reasonable adjustments should not be provided to a juror in a particular trial, the judge may either return the person to the jury pool to potentially serve as a juror on another trial or excuse the person from their summons. In determining whether to excuse a person from their summons the judge may consider the wishes of the person.
10. The Victorian courts should build on existing building improvement programs to improve court accessibility to enable people who are deaf, hard of hearing, blind or have low vision to serve as jurors.

Chapter 12

11. Juries Victoria should coordinate the provision of reasonable adjustments.
12. Juries Victoria should change the juror questionnaire (juror eligibility form) and the juror summons form to request information about the need for adjustments for a person who is deaf, hard of hearing, blind or has low vision.
13. Juries Victoria should contact a potential juror from the subject groups to discuss their needs and to offer a pre-empanelment visit to the court.
14. To assist the Juries Commissioner to make a recommendation to the court about the provision of reasonable adjustments, judges' chambers shall provide Juries Victoria with additional information about evidence that is likely to be material to the outcome of the trial that might make it difficult for the potential juror to serve on that trial.
15. The Juries Commissioner must make a recommendation to the Court about the provision of reasonable adjustments. This should be done as early as possible, preferably before the date the juror is required to attend court in response to their summons.
16. The Juries Act should be amended to give the Juries Commissioner a new power to hold a person out of a ballot for a panel for a trial if the Juries Commissioner determines that the trial is not suitable for the potential juror. This decision should be appealable under section 10 of the Juries Act to either the County Court or the Supreme Court.
17. The final decision about whether a person in the subject groups can serve on a jury should be made by a trial judge on the day of empanelment.
18. The County and Supreme Courts should develop guidance and suggested standard directions to use at the time of empanelment, after the jury has been selected, and at the commencement of formal deliberations, to explain the nature of any adjustments that have been made and how they will work.

Chapter 14

19. The communication requirement in Schedule 2(3)(f) of the Juries Act should be modified so that the requirement to communicate in English does not apply if a juror can communicate in Auslan.
20. Juries Victoria and the courts should make it clear in public information about the new laws that the ability to understand English continues to be a requirement for jury service.
21. The Judicial College of Victoria should develop and deliver training to the judiciary on the Recommended National Standards for Working with Interpreters in Courts and Tribunals and about the training and certification requirements for Auslan interpreters.
22. Auslan interpreters should work in pairs and must be independent of the juror.
23. Auslan interpreters who interpret for jurors should be qualified at a Certified Specialist Legal Interpreter level, or if not available, at a Certified Interpreter level.
24. All Auslan interpreters who interpret for jurors should complete a professional development unit about the role.
25. The courts should develop standards and a code of conduct for Auslan interpreters, which outlines their role and responsibilities. Amendments to the Juries Act should be accompanied by regulation that includes accreditation requirements, standards, and a code of conduct for Auslan interpreters.
26. An oath or affirmation for Auslan interpreters should be included in the Juries Act regarding their duty to maintain confidentiality, not participate in or disclose deliberations and interpret truthfully.
27. When booking Auslan interpreters, Juries Victoria should ensure that wherever possible the same interpreters are available for the duration of the trial to maintain consistency in interpreting.

28. Juries Victoria should retain data about the number of bookings it makes for Auslan interpreters, including the number of interpreters and how long they are needed.
29. The courts and Juries Victoria should pay Auslan interpreters who undertake jury work a rate that is commensurate of the skill required to perform the role and at a level that will retain and attract Auslan interpreters to do this type of work.

Chapter 15

30. The courts and Juries Victoria should ensure that an accessibility officer is available to assist a person from the subject groups, where needed, with practical and logistical issues throughout the jury selection process and the trial. This person would not be permitted to enter the jury deliberation room.
31. The Juries Act should be amended to provide for the appointment of an independent support person to enable a person who is deaf, hard of hearing, blind or has low vision to perform the role of juror.
32. The nature of the support person's role and who should perform the role should be determined by the judge.
33. The courts should develop standards and a code of conduct for support persons, which outline their role and responsibilities. Amendments to the Juries Act should be accompanied by regulation that includes standards and a code of conduct for support persons, and may include accreditation requirements in the future.
34. An oath or affirmation should be included in the Juries Act regarding the support person's duty to maintain confidentiality, not participate in or disclose deliberations, and to well and truly support the juror.
35. The offences in sections 77, 78 and 78A of the Juries Act should be extended to Auslan interpreters and support persons appointed under the Act.
36. A new offence should be introduced to prohibit Auslan interpreters and support persons from interfering with or influencing jury deliberations. This could be modelled on the approach in England and Wales.

Chapter 16

37. The Juries Victoria website should provide information about the excuse process and provide examples for people from the subject groups.
38. The Juries Act should be amended to clarify that section 32(3) may be exercised by the courts on their own motion to excuse a person from the empanelment process for a trial.

Chapter 17


39. When a person from the subject groups is on a jury panel, the judge should inform the court, in the presence of the accused and counsel, but before the jury panel enters, that it is permissible for a person from the subject groups to serve and necessary adjustments have been made to enable them to do so.
40. Juries Victoria should retain data on the number of people who request adjustments to serve and the number who are provided with those adjustments but are peremptorily challenged during the empanelment process.
41. The Department of Public Prosecutions' policy should be amended to specifically provide that stand asides should not be used against people in the subject groups on the basis of disability.
42. Juries Victoria should retain data on the number of people who request adjustments to serve and the number who are provided with those adjustments but are stood aside during the empanelment process.

Chapter 18

43. Disability awareness training should be required for judiciary, Juries Victoria staff, court staff, counsel and lawyers likely to work with juries.
44. Disability awareness training should have a practical focus and be developed and delivered in collaboration with peak advocacy organisations representing people from the subject groups.
45. Professional development training should be provided to the judiciary, legal professionals and Juries Victoria about the way that new laws will work in practice.
46. Juries Victoria, in consultation with the courts, should develop internal protocols to guide its own staff and court staff about the implementation of new laws. These protocols should include practical examples.
47. The *Disability Access Bench Book* should be updated to include information about new laws.
48. Information about the new laws and policies should be widely distributed to the Victorian community in accessible formats, including videos, printed information by Government and advocacy organisations, and on the Juries Victoria and court websites.
49. The Victorian Government should consult with the Aboriginal Justice Caucus, Victorian Aboriginal Community Controlled Health Organisation and Victorian Aboriginal Legal Service about the best way of ensuring culturally appropriate information reaches the Aboriginal community to encourage Aboriginal people from the subject groups to serve on Victorian juries.

Chapter 19

50. Juries Victoria and the courts should collect disaggregated data about people from the subject groups who are summonsed to be in the jury pool and those who go on to serve. Data should be collected at each stage of the jury selection process and in relation to relevant aspects of trials. It should cover at a minimum:
 - types of disability
 - whether potential jurors identify as Aboriginal or Torres Strait Islander
 - adjustments sought
 - adjustments provided including duration of Auslan interpreting
 - the number of times the Juries Commissioner exercises the new powers to hold a person's card out of a ballot
 - the number of times the Juries Commissioner exercises the new powers to defer jury service for a person in the subject groups to arrange adjustments
 - why people excused from jury duty could not serve
 - the number of times judges exercise their discretion not to allow a person to serve on a jury, or otherwise exclude them
 - the number of times people who request adjustments are challenged from jury selection
 - length and nature of trials
 - experiences of the jury selection process and serving as jurors with adjustments.
51. Subject to the confidentiality requirements of section 78 of the Juries Act, Juries Victoria should obtain qualitative data by surveying jurors from the subject groups about their experiences.

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52. Juries Victoria should collate, analyse and report the data in the annual report of the Supreme Court.
 53. The Attorney-General should review the new provisions in the Juries Act five years from the date of commencement, to determine whether the policy objectives of the new provisions are being met and whether any amendments to the Act are needed. A report on the outcome of the review should be tabled in each House of Parliament within 12 months of the review.

Introduction

- 3** Our terms of reference
- 3** The structure of this report
- 3** Why are these reforms necessary?
- 4** Our approach to reform
- 5** A note on language
- 6** Our process
- 7** Reform in coronavirus (COVID-19) times

1. Introduction

We're not just at home being mothered; we are mothers ourselves and we are living in the wider hearing community. We go to school, we have children in school, we come from various backgrounds and there is a huge richness to the experiences that we bring—we're not just simply people who can't hear.¹

—Participant in the Deaf Victoria consultation

- 1.1 This report makes recommendations to remove barriers in current law and practice that prevent Victorians who are deaf, hard of hearing, blind or have low vision from serving as jurors, while ensuring the right to a fair trial.
- 1.2 We contemplate reform from the start of the jury selection process to the conclusion of the trial. Our key recommendation is to amend the *Juries Act 2000* (Vic) (the Act) to require that where a judge considers that reasonable adjustments would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror, the judge must direct that they are provided.
- 1.3 By 'reasonable adjustments' we mean modifications that will facilitate access to jury service on equal terms with others, for example an Auslan interpreter or a device with software that converts written text to speech.² Other adjustments might involve changing the physical layout of a courtroom or providing a juror with a transcript of proceedings and additional reading time. Some reasonable adjustments that may be needed are considered in Chapter 13.
- 1.4 For reform to be effective, both legislative and cultural change are necessary. For professionals involved with jury work we recommend disability awareness training and education about new laws and processes and the reasonable adjustments likely to be required. The public needs accessible information about how new laws will operate. Data about the participation of people who are deaf, hard of hearing, blind or have low vision in the jury system should be collected and reported. New laws should be reviewed five years after commencement to assess whether they are meeting their policy objectives.

¹ Consultation 6 (Deaf Victoria and community participants).

² For a definition of the analogous term 'reasonable accommodations' see *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

Our terms of reference

- 1.5 The inquiry was guided by our terms of reference (see page xiii) which state that the Commission will consider what changes to legislation and practices should be made to enhance access for people who are deaf, hard of hearing, blind or have low vision who wish to serve as jurors in Victoria.

The structure of this report

- 1.6 Part 1 (Chapters 1-10) explores the current jury selection process in Victoria. We consider the benefits reform will provide and the importance of upholding the right to a fair trial. We also examine overseas practices, where people in the subject groups have already served as jurors for many years.
- 1.7 Part 2 (Chapters 11-19) contains our recommendations for change to legislation, practice and procedure.

Why are these reforms necessary?

- 1.8 In developing our recommendations we have been guided by key considerations:
- The United Nations Committee on the Rights of Persons with Disabilities has found that Australia is in breach of its obligations under the Convention on the Rights of Persons with Disabilities (CRPD) by failing to enable people with disabilities to serve on juries with reasonable adjustments.³ Victoria should urgently reform its laws to comply with the recommendations of the Committee.
 - Reform is needed to align jury service with community expectations, laws and policies about equality and the inclusion of people with disabilities in public life. People in the subject groups should have the opportunity to perform their civic responsibility like other members of the community.
 - A key purpose of the Act is that juries should be representative of the community.⁴ Therefore they should include people in the subject groups. Representativeness ensures that a diverse range of views and experiences are offered in the jury deliberation process. More inclusive juries mean that the obligation of jury duty is shared more broadly across the community.
 - Reform should ensure representativeness and inclusivity while upholding fair trial rights.⁵ People from the subject groups must be able to perform the duties of a juror and trials involving jurors from the subject groups must not be prejudiced because of their participation. It is possible for people to serve with reasonable adjustments and to maintain a fair trial. Other jurisdictions have successfully achieved this for decades.
 - Flexibility will be needed about the provision of reasonable adjustments. People in the subject groups should be consulted about what adjustments are required to enable them to serve. A judge should make the final decision about whether a person from the subject groups can serve as a juror on a particular trial.

3 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) ('*Lockrey v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) ('*Beasley v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) ('*JH v Australia*'). See further discussion about the CRPD and these cases in Chapter 6.

4 *Juries Act 2000* (Vic) s 1.

5 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 11 [1.20].

Our approach to reform

The social model of disability

- 1.9 The CRPD adopts a 'social model' of disability, which proposes that disability arises from certain barriers in society. The preamble of the CRPD recognises that:
- disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁶
- 1.10 In other words, as Victoria's new State Disability Plan 2022–2026 notes, 'it is society that places limits on a person, not their disability'.⁷ The social model of disability shifts the focus from an individual's disability to the social environment in which people live. According to this model, disability arises when people encounter physical barriers, digital barriers and barriers of attitudes and communication, which impede their participation in society. By contrast, the medical model looks at disability as 'a medical condition ... for health professionals to treat, fix or cure'.⁸
- 1.11 Applying this social model to jury duty, the Commission's reforms focus on the interaction between the potential juror and the demands of the particular trial on which they are called to serve. This approach provides a framework for addressing and removing barriers to participation, while safeguarding the right to a fair trial.

Building on other reform ideas

- 1.12 This project responds to ongoing calls for change from the community and recent challenges to the law.⁹ Other Australian and international law reform agencies and various reports have been calling for change for over 15 years.¹⁰ In 2018 the Australian Capital Territory (ACT) became the first, and only, Australian jurisdiction to implement major reform in this area.
- 1.13 We have examined the recommendations of other law reform agencies in designing the recommendations in this report. We have also considered what happens in overseas jurisdictions including the United States, England and Wales, and New Zealand, where people with disabilities currently serve as jurors. Our reforms adapt these approaches for a Victorian context.

6 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Preamble (e). Article 1 further recognises that 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

7 Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022) 11.

8 See the succinct discussion about the social model of disability in Australian Government, 'People with Disability', *Style Manual* (Web Page, 2022) <<https://www.stylemanual.gov.au/format-writing-and-structure/inclusive-language/people-disability>>.

9 See, eg, Eliza Nugent, Preyasi Domun and De Alwis Winuri, *Advancing Jury Inclusivity in Australia* (Report, Remedy Australia, Castan Centre for Human Rights Law, Monash University, August 2021); Tammy Mills, 'Law Reform Needed to Allow Deaf and Blind People on Juries', *The Age* (online, 17 January 2021) <<https://www.theage.com.au/national/victoria/law-reform-needed-to-allow-deaf-and-blind-people-on-juries-20210115-p56uav.html>>; Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Blocks Australian Gale Lyons' Bid', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us.-nz/7905810>>; Jemina Napier, 'Deaf or Blind People Can't Serve on Juries—Here's Why the Law Needs to Change', *SBS The Feed* (online, 25 October 2016) <<https://www.sbs.com.au/news/the-feed/deaf-or-blind-people-can-t-serve-on-juries-here-s-why-law-needs-to-change>>; *Lyons v State of Queensland* [2016] HCA 38, (2016) 259 CLR 518. There have also been three successful complaints of human rights breaches brought to the UN Convention Committee, as discussed in Chapter 6.

10 In chronological order, these reports are: New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006); Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Final Report Project No 99, April 2010); Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011); Law Reform Commission (Ireland), *Jury Service* (Report No 107, April 2013); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014); See also: Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016). Other reports have sought community responses about reform: see Department of Justice (WA), *Participation of People with a Disability in Jury Service* (Discussion Paper, March 2020); Department of Justice and Regulation (Vic), *Equality and Fairness in Jury Selection* (Discussion Paper, 2016).

Working with the existing jury selection process

- 1.14 The recommendations in this report do not re-imagine the entire jury selection process. Reforms aim to modify existing processes as simply as possible. They ensure that the judge retains flexibility to respond to needs as they arise, and that trials continue to run efficiently and fairly.
- 1.15 Our recommendations provide a roadmap for Juries Victoria and the courts. The finer details of implementation will need to be settled when it is clear how case management will change in the courts after the coronavirus (COVID-19) pandemic.

A note on language

- 1.16 Language is a tool that can help improve inclusivity in our community. People with disabilities have worked hard to reframe language to support the protection of their human rights.
- 1.17 Just as people's experience of disability differs, their preferences about the way they choose to describe themselves also varies.¹¹ In this report, we use person-first language (eg 'person with disabilities') because it emphasises a person's right to an identity beyond their disability. Our approach is consistent with the language in the CRPD.
- 1.18 However, we recognise that some people prefer identity-first language ('disabled person') because their disability is an important part of their personal identity. We also note that many people in the Deaf community do not identify as having a disability, and instead identify as a culturally and linguistically distinct group. We acknowledge that the use of language is always evolving.

Terminology we use

- 1.19 Throughout this report, we refer to people who are deaf, hard of hearing, blind or have low vision as 'the subject groups'.
- 1.20 In our consultation paper we used the term 'reasonable supports' and 'Auslan interpreters' to refer to accessibility tools to enable inclusive juries. While the use of the term 'supports' is easy to understand, we have decided to change our approach for this final report to refer to 'reasonable adjustments'.
- 1.21 'Reasonable adjustments' is the term used in the *Equal Opportunity Act 2010* (Vic).¹² It is also used in the *Disability Access Bench Book* which 'provides practical guidance on matters to consider when a party or witness has a disability'¹³ so that people with disabilities can 'participate on an equal basis with others and realise their rights'.¹⁴ Changing this terminology aligns more closely with the approach in the CRPD, which uses the term 'reasonable accommodations'.¹⁵
- 1.22 This change also addresses concerns that an Auslan interpreter should not be viewed as a 'support' but instead as an accessibility tool.¹⁶

11 See, eg, 'Community and Culture', *National Association of the Deaf* (Web Page) <<https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/>>.

12 *Equal Opportunity Act 2010* (Vic).

13 Judicial College of Victoria, '1.1 Background', *Disability Access Bench Book* (Online Manual, 1 December 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

14 Ibid.

15 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

16 Concern was raised in consultations: see, eg, Consultation 6 (Deaf Victoria and community participants).

Our process

- 1.23 This is a community law reform project, initiated by the Commission itself. The Commission can initiate its own inquiries into legal issues of general community concern if they are limited in size and scope.¹⁷ Other inquiries are referred to the Commission by the Victorian Attorney-General. (See list on the inside back cover).
- 1.24 The project commenced in March 2020 and was completed in July 2022.

Our leadership

- 1.25 The Hon. Anthony North QC was the Commission's Chair for this project. He established a Division to guide and make decisions about the project. Commissioners on the Division were Liana Buchanan, the Hon. Jennifer Coate AO, Kathleen Foley SC, Bruce Gardner PSM, Gemma Varley PSM and Dr Vivian Waller.
- 1.26 We appointed Professor Emeritus Ron McCallum AO as a special advisor to the project. Professor McCallum is an Australian legal academic who has been blind since birth. He has been Dean of Sydney University Law School, chaired the United Nations Committee on the Rights of Persons with Disabilities and is a former Special Advisor to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Professor McCallum provided invaluable guidance and personal insights to the project.

Community responses

- 1.27 In December 2020 we published a consultation paper explaining the current law in Victoria and examining law and practice interstate and overseas. We asked a range of questions about possible reform directions and invited the community to submit their views. A summary paper was also published, linked to a short online survey. The summary paper and survey were available in Microsoft Word, Auslan and audio formats to ensure broad accessibility. We received 14 written submissions (see Appendix A) and 27 survey responses from community members.
- 1.28 We held two stages of consultations. First, we held preliminary meetings with people who worked in the justice system, such as Juries Victoria and representatives of the higher courts that run jury trials. We spoke to some disability advocacy organisations and academics who had studied this area. Along with our own research, these meetings helped us develop our consultation paper.
- 1.29 After the release of the consultation paper, we held a wide range of formal consultations including with:
- disability advocacy organisations
 - members of the community
 - legal professionals, several judges at the Victorian County and Supreme Courts, the Victorian Criminal Bar Association, the Office of Public Prosecutions Victoria, the Law Institute of Victoria, and the Victorian Equal Opportunity and Human Rights Commission
 - Juries Victoria
 - jury authorities and courts interstate and overseas
 - Auslan service providers and interpreter associations
 - academics
 - the Victorian Aboriginal Community Controlled Health Organisation.
- 1.30 Due to coronavirus (COVID-19) restrictions, most of our consultations were undertaken online, including with people from regional Victoria, other parts of Australia and overseas. The seamless nature of these consultations showed us how easily technology can assist with accessibility.

- 1.31 We held 29 consultations (see Appendix B). We are grateful to the people named in Appendix B for contributing to our project. The Commission is appreciative of their willingness to meet online despite the challenges and to share their experiences and views. Their ideas and voices are reflected in this report. We expect their valuable contributions will shape change that will benefit others.

What was out of scope

- 1.32 This project is limited in focus to those who are deaf, hard of hearing, blind or have low vision. We do not consider reforms to remove barriers to participation on juries for people with other disabilities. We also have not considered whether a person who cannot understand or speak English should be able to be a juror.
- 1.33 We recognise that recent reforms in the ACT apply to people who have an insufficient understanding of the English language, as well as anyone who has a mental or physical disability.¹⁸ Although these topics are beyond the scope of this report, many of the Commission's observations regarding people in the subject groups could be more broadly applied.

Data in our report

- 1.34 Due to coronavirus (COVID-19), jury trials were significantly disrupted in Victoria in 2020 and 2021. Therefore, we refer to data from 2018 and 2019 for a more typical snapshot of the jury system in Victoria.

Reform in coronavirus (COVID-19) times

- 1.35 Jury trials were suspended due to lockdowns from March to November 2020, and on and off in 2021. When they recommenced, social distancing requirements meant that Juries Victoria had to adapt its processes and initially manage its empanelment process online. In Melbourne, the County Court jury selection process occurred via remote feeds from the jury pool room to the courtroom. The same occurred in the seven circuit locations where courtrooms had been reconfigured to meet social distancing requirements. This resulted in some larger jury boxes being built and because many existing deliberation rooms could not be reconfigured to meet social distancing requirements, a second courtroom was used as a deliberation room. This meant that often one trial required two courtrooms.¹⁹
- 1.36 In the urgent response to the pandemic, the courts and Juries Victoria have demonstrated that they can adapt quickly.²⁰ Many of the tools that the courts and legal profession have adopted to respond to the challenges of the pandemic have been used by people in the subject groups for some time. The reforms proposed by this report are therefore timely.
- 1.37 We are aware that a large backlog in jury trials created by the pandemic and competing funding priorities will create challenges post-pandemic. However, this should not slow the implementation of our recommendations. Because only a small number of trials are likely to be impacted, we are confident that reforms can be implemented reasonably easily, without placing a large burden on Juries Victoria or the courts.

¹⁸ *Juries Act 1967* (ACT) s 16.

¹⁹ Information provided by Juries Victoria to Victorian Law Reform Commission, 20 September 2021.

²⁰ See, eg, 'COVID-19 and the Court', *Supreme Court of Victoria* (Web Page, 3 March 2022) <<http://www.supremecourt.vic.gov.au/news/covid-19>>; 'Coronavirus (COVID-19) Divisional Responses', *County Court of Victoria* (Web Page, 24 November 2021) <<https://www.countycourt.vic.gov.au/news-and-media/news-listing/2021-09-16-coronavirus-covid-19-divisional-responses>>; 'Coronavirus and the Courts', *Judicial College of Victoria* (Web Page) <<https://www.judicialcollege.vic.edu.au/resources/coronavirus-and-courts>>; Juries Victoria, 'Juror Safety during COVID-19', *Juror Portal* (Web Page, 16 February 2022) <<https://www.juriesvictoria.vic.gov.au/juror-safety-during-covid-19>>.

CHAPTER 02

What is a jury and how is it selected?

- 10 Overview
- 10 What is the role of a jury?
- 12 How is a jury selected?

2. What is a jury and how is it selected?

Jurors contribute in an extraordinary and fundamental way to the delivery of justice in Victoria. Juries are the voice of the community's conscience, independent of both the judiciary and the government.¹
—Paul Dore, Juries Commissioner of Victoria

Overview

- Juries play a fundamental role in our legal system. They allow the community to be directly involved in the administration of justice.
- The Victorian jury system is busy. Jury trials for civil and criminal matters occur in the Supreme Court of Victoria and the County Court of Victoria. Most jury trials are run in the County Court.
- Some steps in the jury selection process are determined by random ballot. Random selection presents challenges for planning the provision of reasonable adjustments and judicial assessments. It is difficult to anticipate whether a person who attends court in response to a jury summons will ultimately serve as a juror and on what trial they may serve.

What is the role of a jury?

- 2.1 The role of the jury is to decide the facts, apply relevant principles of law to those facts, and return a verdict.²
- 2.2 In Victoria there is no constitutional right to a jury trial but its use for serious offences is widely supported and established.³ Victoria Legal Aid stated in its submission: 'The jury's role in criminal trials is one of the most important features of our criminal justice system'.⁴ The County Court referred to the jury as a 'little parliament' which serves to 'ensure a measure of democratic participation, and therefore, democratic legitimacy, to the administration of justice'.⁵

1 Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 31.

2 Judicial College of Victoria, '1.4 The Role of Judge and Jury', *Victorian Criminal Charge Book* (Online Manual) [1] <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>, citing *R v Dao* [2005] VSCA 196, (2005) 156 A Crim R 459; *R v Nguyen* [2006] VSCA 158; *Azzopardi v The Queen* [2001] HCA 25, (2001) 205 CLR 50.

3 The *Criminal Procedure Act 2009* (Vic) sets out the procedure for hearing and determining criminal offences in Victoria. For indictable offences, this procedure includes trial by jury: *Criminal Procedure Act 2009* (Vic) pt 2.4. Unlike in Victoria, there is constitutional recognition of a right to trial by jury for Commonwealth offences tried on indictment: *Commonwealth of Australia Constitution Act 1900* (Cth) s 80.

4 Submission 8 (Victoria Legal Aid).

5 Submission 14 (County Court of Victoria).

2.3 The purposes of jury trials are:

- safeguarding the rights of the accused by limiting the power of the state
- ensuring that justice is in line with the community's standards, rather than just those of judges, who may not be considered representative of the broader community⁶
- enabling the community to participate directly in the administration of justice, and thereby increasing acceptance of trial outcomes and confidence in the legal system more generally.⁷

Jury administration

2.4 In Victoria the jury selection process is regulated by the *Juries Act 2000* (Vic) (the Act). The Juries Commissioner is responsible for jury administration through Juries Victoria.⁸ The Juries Commissioner has 'oversight and fulfilment of the state's role in providing citizens for jury service in the superior courts'.⁹ This statutory role is unique to Victoria. In other Australian states and territories, this responsibility lies with the court sheriff.¹⁰

The number of jury trials in Victoria

2.5 In Victoria juries are used for almost every Supreme and County Court criminal trial and for some civil trials.¹¹ During the coronavirus (COVID-19) pandemic, some trials were heard by judges alone.¹²

2.6 Jury trials are mandatory for indictable criminal matters (serious criminal offences).¹³ These criminal trials are initiated by the Director of Public Prosecutions on behalf of the community. The community is involved in determining the verdict via a jury.

2.7 In contrast, civil matters involve the resolution of disputes between parties, and jury trials are not mandatory. In civil trials the jury, if there is one, determines findings of fault or damages. The availability of a jury in a civil trial depends on the remedy sought and the way in which the parties initiate the proceedings. A civil party may apply for a jury trial; but the court decides whether this occurs.¹⁴

2.8 In 2018–19, before the coronavirus (COVID 19) pandemic, the County Court heard 306 criminal jury trials in Melbourne and 110 criminal jury trials in regional Victoria. The County Court heard 31 civil jury trials in Melbourne and nine in regional courts. The Supreme Court heard 39 criminal jury trials in Melbourne and seven in regional Victoria. It heard 16 civil jury trials in Melbourne and six in regional Victoria.¹⁵

6 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 [2.5], citing Mark Findlay, 'Juries Reborn' [2007] (90) *Reform* 9.

7 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 [2.5], citing Mark Findlay, 'The Essence of the Jury' (2000) 12(2) *Legaldate* 5. The strengths of the jury system are also canvassed in Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.11]–[1.15], including that a jury is free to determine cases equitably by not being bound by precedent; encouraging respect for the law, a sense of duty to society and an understanding of legal rights; ensuring a judge is free from the obligation to determine facts.

8 *Juries Act 2000* (Vic) ss 60–4; Victorian Government, 'Juries Victoria', *What Is Jury Service?* (Web Page) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>.

9 Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 4.

10 *Ibid* 4.

11 *Ibid* 5.

12 The *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) inserted Chapter 9 into the *Criminal Procedure Act 2009* (Vic) ('CPA') to temporarily change the CPA in response to the COVID-19 pandemic. These changes introduced judge alone trials for the first time in Victoria, for a brief period, ending in April 2021: Supreme Court of Victoria, *Trial by Judge Alone COVID-19 Emergency Protocol* (Report, May 2020); Judicial College of Victoria, *Judge Alone Trial Applications* (Report, 2021); Karin Derkley, 'Judge-Alone Trials Help Reduce Backlog: Chief Judge Kidd', *Law Institute of Victoria* (Web Page, 19 August 2020) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/August-2020/Judge-alone-trials-help-reduce-backlog--Chief-Judg>>.

13 These are known as 'indictable' criminal offences. For discussion: see Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 10 [2.13].

14 *Ibid* 11 [2.22]–[2.24].

15 Supreme Court of Victoria, *Annual Report 2019–2020* (Report, March 2021) 64.

How is a jury selected?

- 2.9 Twelve jurors are generally selected for criminal trials and six jurors for civil trials.¹⁶
- 2.10 A person summonsed to attend jury service is not automatically included in a jury. The stages in the jury selection process are shown in the figure below.



- 2.11 These stages were described in detail in Chapter 3 of the consultation paper.¹⁷ A brief description follows.

Random selection from the electoral roll

- 2.12 At the request of the Juries Commissioner, the Victorian Electoral Commission randomly selects several thousand people at a time from the Victorian electoral roll to serve on juries in districts in which they reside.¹⁸ Juries Victoria mails the notice of selection and questionnaire to those people selected from the roll.¹⁹
- 2.13 Random selection is an important feature of the jury system.²⁰ It is tied to the notion that a jury should be representative of the community. It guards against bias by ensuring that those that determine the outcome of a trial have not been chosen by the court or the parties.²¹ Random selection occurs at various points in the jury selection process. It means that it will not be known which trial, if any, a person will be balloted to until the last minute. This makes it difficult to plan for the provision and assessment of reasonable adjustments. Reform needs to work within the confines of the random selection process.

Determination of liability for jury service

- 2.14 The notice of selection includes a questionnaire (jury eligibility form) about a person's circumstances which will inform Juries Victoria's assessment of their liability to take part in jury service.²² Information about eligibility and availability is entered into Jury Victoria's jury management system.
- 2.15 There are three types of exceptions to jury service:
- 1) those ineligible to serve
 - 2) those excused from service
 - 3) those disqualified from serving.²³
- 2.16 People who are ineligible to serve include lawyers, some public servants and those involved in the administration of justice.²⁴ People who cannot communicate in or understand English are also ineligible.²⁵ This means that people who use Deaf Interpreters will be ineligible to serve on a Victorian jury (see Chapter 3).

¹⁷ Juries Victoria has published a video that explains jury service in Victoria: see Department of Justice and Community Safety (Vic), 'What Is Jury Service?', *Juries Victoria* (Web Page, 2021) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>.

¹⁸ *Juries Act 2000* (Vic) s 20. See also: Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 13.

¹⁹ Juries Victoria has created a video for individuals explaining the 'Notice of Selection' stage: see Department of Justice and Community Safety (Vic), 'Notice of Selection', *Juries Victoria* (Web Page, 2021) <<https://www.juriesvictoria.vic.gov.au/individuals/notice-of-selection>>; Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 5.

²⁰ The purpose of the *Juries Act* includes 'to provide for the operation and administration of a system of trial by jury that (a) equitably spreads the obligation of jury service amongst the community; and (b) makes juries more representative of the community'. Section 4 of the *Juries Act* requires that 'If this Act requires that one or more persons be selected, the selection must be random': see *Juries Act 2000* (Vic) ss 1, 4.

²¹ Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [3.8]–[3.10]; Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 2 [2.8]; Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 22.

²² *Juries Act 2000* (Vic) s 20. See also: Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 5.

²³ Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 15.

²⁴ *Juries Act 2000* (Vic) sch 2.

²⁵ *Ibid.*

- 2.17 People can apply to be excused by the Juries Commissioner for good reason, or to defer their jury service to a better time.²⁶ Being excused from service means that a person has a reason for being unable to attend or to sit on a jury for a particular case. It is at this early stage that people in the subject groups usually seek to be excused.²⁷
- 2.18 Other people are disqualified (usually for a limited period) if they have been convicted of certain serious offences or are on bail/remand or are undischarged bankrupts.²⁸

Summons

- 2.19 Juries Victoria issues a summons to potential eligible jurors two to three weeks ahead of the court attendance date.²⁹ Information about eligibility, deferral and excuse categories is provided with the summons. The Juries Commissioner also provides an online orientation program for people who are summonsed. It includes short video clips and information about what to expect during the selection process, payment for jury duty, employer obligations, dress code and meals, juror responsibilities and the need to be available for two weeks. This is sent to potential jurors seven days before their summons date.³⁰
- 2.20 After a person receives a summons and before they become a member of a panel (see further discussion below), they can apply to be excused or to defer their service.³¹ The Act also gives the Juries Commissioner and the court the power to excuse potential jurors.³² We discuss excuse further in Chapter 16.
- 2.21 Potential jurors who have not applied for or been granted an excusal or deferral must confirm that they will attend court.

The jury pool

- 2.22 Potential jurors are required to attend court and become part of a large group known as the 'jury pool'.³³ People who attend court on any given day make up the pool from which 'panels' for individual trials are balloted. Juries Victoria does not summons on the basis of individual court needs but based on the collective needs of both courts.³⁴
- 2.23 In Melbourne, according to Juries Victoria, '400 people are summonsed to attend on a Monday to cover trials for a Monday and a Tuesday; 350 on Wednesday to cover Wednesday and Thursday and 150 on a Friday'.³⁵ Jury pools are smaller in each region or court circuit location.³⁶ During the pandemic there have been much smaller jury pools.³⁷
- 2.24 In Melbourne, the jury pool assembles in the County Court building in the jury pool room/area. The pool is available for any number of Supreme and County Court trials beginning on a given day.³⁸ The jury pool is given an orientation program by Juries Victoria, explaining the role of a juror, rate of pay and the selection process. Questions about jury service are answered by the pool supervisor and a short video is shown about what to expect in court.³⁹

26 Ibid ss 8 and 7, respectively.

27 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.

28 *Juries Act 2000* (Vic) sch 1.

29 Ibid s 27. See also Department of Justice and Community Safety (Vic), 'What Is Jury Service?', *Juries Victoria* (Web Page, 2021) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>.

30 Information provided by Juries Victoria to Victorian Law Reform Commission, 17 May 2022.

31 *Juries Act 2000* (Vic) ss 7, 8, 9.

32 Ibid ss 11, 12.

33 We note that legislative changes brought about due to the coronavirus (COVID-19) pandemic temporarily enable remote jury empanelling to respond to social distancing requirements.

34 Consultation 10 (Juries Victoria).

35 Ibid. These figures refer to the period before the coronavirus (COVID-19) pandemic which began in 2020.

36 Information provided by Juries Victoria to Victorian Law Reform Commission, 17 May 2022.

37 Consultation 10 (Juries Victoria).

38 Jury panels are not used in regional areas, as jury trials are rarely held concurrently. In regional areas the entire jury pool that attends in response to the summons constitutes the jury panel. Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 15 [2.52].

39 These and other videos explaining jury service are available online: Juries Victoria, 'Individuals', *Juror Portal* (Web Page, May 2019) <<https://www.juriesvictoria.vic.gov.au/individuals>>; Juries Victoria, *YouTube* (Web Page, 2019) <<https://www.youtube.com/channel/UCTgVsMpocy2oeO4CPV4hexA/videos>>.

- 2.25 The jury pool supervisor outlines that a person will need to be available for jury duty for up to two weeks, the average length of a trial.⁴⁰ Information is also provided about the possible grounds for excuse.⁴¹ Another estimate of the duration of jury duty is provided to the pool when the Juries Commissioner draws a ballot for a panel for a particular trial. The Juries Commissioner will also inform the entire pool if there is a particularly long trial starting that will require longer jury service. If a person is unavailable to serve on a trial because of its length this is another opportunity to seek to have service deferred or to be excused.⁴² This process helps to minimise the number of excuse applications heard in court.⁴³

Random selection from the jury panel

- 2.26 Once all people who have been excused from the pool leave the jury pool room, ballot cards are generated from the pool list for each potential juror and are placed in the ballot box. Juries Victoria will randomly select people from a ballot box to form a jury panel.⁴⁴ Groups of 25–40 people ('jury panels'), then go into courtrooms where the trials will be held.⁴⁵

Criminal trials

- 2.27 In criminal trials, the accused is sitting in the dock when the panel enters the courtroom. When the panel is seated the judge directs that the accused is formally charged with offences (a process known as 'arraignment'). Charges are read out and the accused pleads to each charge.⁴⁶
- 2.28 The judge then informs the panel about the trial: for example, the type of charge, the names of the accused (in a criminal trial) or parties (in a civil trial), witnesses, and the estimated length of the trial. The panel numbers are read out and the court then calls on potential jurors who seek to be excused. The court may excuse a person if satisfied that the person will be unable to consider the case impartially or is unable to serve for any other reason. A person who is excused by the judge stays in their seat but their ballot card does not go into the ballot box.⁴⁷ That person will subsequently return to the jury pool room to potentially serve on another trial.⁴⁸
- 2.29 Each remaining jury panel member's card is then placed in the ballot box. Panel members are selected from the ballot box, one at a time. The parties are then able to challenge potential jurors to exclude them from the jury.⁴⁹ The only information that parties are given to base challenges on are the person's juror number (or name if directed by the judge) and their current occupation.⁵⁰ The physical appearance and demeanour of the potential jurors is revealed by their presence.⁵¹ The Act provides that each person who is arraigned must be given 'an adequate opportunity to view the face of the potential juror' before they are seated.⁵²
- 2.30 The two most common types of challenges: 'peremptory challenges' and the Crown 'stand aside' in criminal trials, are discussed in Chapter 17.

40 Juries Victoria told us that in 2018–2019 the average length of civil and criminal trials was eight days in the County Court and 16 days in the Supreme Court: Information provided by Juries Victoria to Victorian Law Reform Commission, 6 June 2022.

41 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 15 [2.47].

42 The Juries Commissioner may exclude a person from a pool if the Juries Commissioner is satisfied that the person is unavailable to sit on a trial due to the likely length of the trial: *Juries Act 2000* (Vic) s 29(4B). See also the general power of the Juries Commissioner to excuse people for good reason under s 8.

43 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.

44 *Juries Act 2000* (Vic) s 30.

45 Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 5.

46 *Criminal Procedure Act 2009* (Vic) ss 215(1), 217.

47 Information provided by Juries Victoria to Victorian Law Reform Commission, 17 May 2022.

48 *Juries Act 2000* (Vic) s 32. The Court may also determine that a person will not perform jury service if it thinks it is just and reasonable to do so, on its own motion or on application from the Juries Commissioner under s 12.

49 *Ibid* ss 37–40. See also Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) xi.

50 *Juries Act 2000* (Vic) ss 36(1)(b), 30A(2).

51 *Ibid* ss 30A, 31. See also Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [76] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>> which notes that 'Failure to provide an adequate opportunity to see the faces of potential jurors is a fundamental interference with the right to exercise peremptory challenges and is a fundamental defect in the running of a trial', citing *Theodoropoulos v The Queen* [2015] VSCA 364, (2015) 51 VR 1.

52 *Juries Act 2000* (Vic) s 39(2A)–(2C).

- 2.31 Potential jurors who are not challenged proceed to the jury box. When the required number of jurors (usually 12)⁵³ are in the jury box, they are sworn or affirmed⁵⁴ as the jury. The remainder of the panel returns to the pool (unless the court orders otherwise).⁵⁵

Civil trials

- 2.32 In civil trials, after the court has provided information to the panel about the trial and excuses have been heard by the judge, ballot cards are drawn from a ballot box. Selected persons have their identifying number (or name if directed by the judge) and occupation called out.⁵⁶ A list is created of the persons selected. The parties strike names off the list according to their respective challenges. This is done in writing.⁵⁷ The remaining names on the list (usually six) are the jury for the trial.⁵⁸ On being empanelled, jurors must take an oath or make an affirmation in open court.⁵⁹

People who are not selected

- 2.33 People who are not selected to serve as a juror by the end of the day are generally sent home, 'their jury service having been completed simply by making themselves available to potentially serve on a trial'.⁶⁰ Sometimes trial scheduling requirements may mean that people in the pool may have to return on another day.⁶¹

People in the subject groups

- 2.34 Part 2 (Chapters 11-19) of this report considers the changes that will need to occur at the various stages of the jury selection process to reduce barriers to participation for people in the subject groups.

53 Up to three additional jurors may be empanelled in criminal trials: *ibid* ss 22(2), 23(1)(a). Additional jurors are discussed in Chapter 9.

54 See Glossary.

55 *Juries Regulations 2021* (Vic) reg 6.

56 *Juries Act 2000* (Vic) ss 33(1)(a)(iii), 30A(2).

57 *Ibid* ss 33, 34, 35.

58 Up to two additional jurors may be empanelled in civil trials: *ibid* ss 22(1), 23(1)(b).

59 *Ibid* s 42.

60 Department of Justice and Community Safety (Vic), 'What Is Jury Service?', *Juries Victoria* (Web Page, 2021) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>.

61 Information provided by Juries Victoria to Victorian Law Reform Commission, 17 May 2022.

People who are deaf, hard of hearing, blind or have low vision in our community

- 18** Overview
- 18** A note on population data
- 18** People who are blind or have low vision
- 19** People who are deaf or hard of hearing
- 20** Aboriginal people in the subject groups

3. People who are deaf, hard of hearing, blind or have low vision in our community

Overview

- People who are deaf, hard of hearing, blind or have low vision comprise a small but increasing proportion of the overall Australian and Victorian populations.
- As the population ages, more people selected for jury duty may need reasonable adjustments to enable them to serve.
- Aboriginal people are more likely to be deaf, hard of hearing, blind or have low vision than the general population.
- It is important to make juries more representative by facilitating access to people in the subject groups. The benefits of this reform will flow to the justice system, regardless of the number of trials likely to be directly impacted by the use of reasonable adjustments.

A note on population data

- 3.1 The data is limited on how many people are deaf, hard of hearing, blind or have low vision in Australia, and there is a lack of up-to-date data for Victoria.¹ The available statistics relate to proportions of the overall population rather than the smaller proportion that may be eligible for jury service.²
- 3.2 As the Victorian population ages, it is likely that the number of people in the subject groups will increase.³ The number of Victorians aged 65 and over is set to triple by 2058.⁴

People who are blind or have low vision

- 3.3 The Australian Institute of Health and Welfare (AIHW) describes 'vision impairment' as:
the partial or full loss of sight in one or both eyes. Visual impairment may be the result of disease or injury, may progress over time, and may be permanent or corrected with visual aids (such as glasses) or with surgery.⁵
- 3.4 A person is considered blind if they 'cannot see at six metres what someone with normal vision can see at 60 metres or if their field of vision is less than 20 degrees in

1 Census data from 2021 will be released in a staged approach from June 2022: '2021 Census Data Release Timeline', *Australian Bureau of Statistics* (Web Page, 16 July 2021) <<https://www.abs.gov.au/census/2021-data-releases>>; 'Australia's Health 2020', *Australian Institute of Health and Welfare* (Web Page) <<https://www.aihw.gov.au/reports-data/australias-health>>.

2 There are 4,340,793 people on the roll in Victoria as at 1 March 2022: 'Electoral Roll Statistics', *Victorian Electoral Commission* (Web Page, 2021) <<https://www.vec.vic.gov.au/enrolment/electoral-roll-statistics>>. Jurors are pooled from this group, less those deemed ineligible or disqualified under the *Juries Act 2000* (Vic).

3 Chronic eye conditions vary in their presentation, treatment and consequences, but almost all are more common in older people. 'Eye Health, How Common Is Visual Impairment?', *Australian Institute of Health and Welfare* (Web Page) <<https://www.aihw.gov.au/reports/eye-health/eye-health/contents/how-common-is-visual-impairment>>.

4 'Ageing', *Department of Health and Human Services Victoria* (Web Page, 2020) <<https://www.dhhs.vic.gov.au/ageing>>.

5 Australian Institute of Health and Welfare, *Eye Health* (Online Report, Catalogue No PHE 260, 11 February 2021) <<https://www.aihw.gov.au/reports/eye-health/eye-health/contents/how-common-is-visual-impairment>>.

diameter'.⁶ A person has low vision if they 'have permanent vision loss that cannot be corrected with glasses and affects their daily functioning'.⁷

- 3.5 Based on census data from the Australian Bureau of Statistics (ABS), Vision Australia estimated in 2014 that approximately 357,000 people in Australia were blind or had low vision. This number was predicted to increase to more than 564,000 by 2030.⁸ In 2014, Vision Australia reported that approximately 89,500 people in Victoria were blind or had low vision, and that this was likely to rise to around 138,000 by 2030.⁹

People who are deaf or hard of hearing

- 3.6 The World Health Organisation describes someone who is deaf as having 'profound hearing loss, which implies very little or no hearing. They often use sign language for communication'. They describe someone who is 'hard of hearing' as having 'hearing loss ranging from mild to severe'.¹⁰
- 3.7 The most recent statistics on people who are deaf or hard of hearing were collated in 2016 by the AIHW, based on 2014–15 ABS data. Key findings included:
- Complete or partial deafness affects one in 10 Australians.¹¹
 - Over three million Australians (14 per cent) have at least one long-term hearing disorder.
 - The proportion of people with long-term hearing disorders increases with age, from three per cent of children aged 0–14, to 49 per cent of people aged 75 and over.¹²
- 3.8 In 2015, the ABS reported that:
- More than one in four people with disability used communication aids such as cochlear implants or speaking aids.
 - Use of hearing aids by older Australians increased from 28 per cent in 2009 to 32.6 per cent in 2015.¹³

Australian Sign Language (Auslan)

- 3.9 People who are deaf from birth or childhood are more likely to know and use Auslan as their 'primary or preferred language', and to identify as part of the Deaf community.¹⁴ The Deaf community is a distinct 'linguistic or cultural minority group' whose use of Auslan is the main unifying factor.¹⁵
- 3.10 The use of Auslan has increased steadily in Australia.¹⁶ The Australian Network on Disability reports that there are approximately 30,000 Auslan users in Australia.¹⁷ The 2021 Census referred to Auslan as a language option for the first time.¹⁸

6 'Blindness and Vision Loss', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/newly-diagnosed/blindness-and-vision-loss>>.

7 Ibid.

8 Vision Australia, Submission No 112 to Family and Community Development Committee, Parliament of Victoria, *Inquiry into Social Inclusion and Victorians with a Disability* (March 2014) 2. A more recent study of the prevalence of blindness and low vision was undertaken by B Ah Tong et al, *A Snapshot of Blindness and Low Vision Services in Australia* (Australian Blindness Forum Report, August 2015).

9 Vision Australia, Submission No 112 to Family and Community Development Committee, Parliament of Victoria, *Inquiry into Social Inclusion and Victorians with a Disability* (March 2014) 2.

10 'Deafness and Hearing Loss', *World Health Organisation* (Web Page, 1 April 2021) <<https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss>>.

11 This can be compared to 0.6% of the population that has complete or partial blindness: Australian Institute of Health and Welfare, *Australia's Health 2016* (Australia's Health Series No 15, Catalogue No AUS 199, 13 September 2016) 117 <<https://www.aihw.gov.au/reports/australias-health/australias-health-2016/contents/summary>>.

12 Ibid 117–118.

13 Australian Bureau of Statistics, *Use of Aids and Equipment by People with Disability in Australia* (Disability, Ageing and Carers, Australia, Information Sheet, 2015).

14 Deaf Australia, Submission No 37 to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (20 January 2014) 14.

15 The Australian Government recognised the Deaf community as a language group in 1991: *ibid* 5–6. See also 'Becoming a Part of the Deaf Community', *Hearing Australia* (Web Page) <<https://www.hearing.com.au/Hearing-loss/Management/Becoming-a-part-of-the-Deaf-Community>>. For a discussion of Deaf culture: see Deaf Australia, 'Deaf Culture', *Aussie Deaf Kids* (Web Page, October 2021) <<https://www.aussiedeafkids.org.au/deaf-culture.html>>.

16 From 5,306 in 2001 to 11,682 in 2016: see Deaf Australia, 'Census 2021' (Media Release, 9 June 2020).

17 'Disability Statistics', *Australian Network on Disability* (Web Page, 15 November 2019) <<https://www.and.org.au/resources/disability-statistics/>>.

18 This data is due to be released in June 2022: Deaf Australia, 'Census 2021' (Media Release, 9 June 2020).

- 3.11 Victorian data on Auslan use is limited. In 2016 the Victorian Government reported that there were 2,874 Auslan users (up by 12 per cent from 2,566 in 2011).¹⁹

Deaf Interpreters

- 3.12 Some people who are deaf cannot communicate through the English language or Auslan and cannot read or write in English. They often communicate through gestures known to their close family or household and require these people to act as intermediaries to communicate with others.²⁰ Deaf Interpreters with specialised communication skills sometimes work together with Auslan-English interpreters to bridge gaps in information. This enables people without English or Auslan skills to communicate with others when needed.²¹
- 3.13 If a person cannot communicate in or understand the English language, they are ineligible to serve on a Victorian jury. This rule applies to everyone.²²

Aboriginal people in the subject groups

- 3.14 According to 2016 Census data, approximately 0.8 per cent of the Victorian population identifies as Aboriginal or Torres Strait Islander (1.6 per cent of the population of Victoria excluding Melbourne, and 0.5 per cent of the population of Melbourne).²³
- 3.15 Aboriginal people are more likely to be deaf, hard of hearing, blind or have low vision than other Victorians. In 2018, 24 per cent of Aboriginal people of all ages in private households were living with disability.²⁴
- 3.16 The 2018–19 National Aboriginal and Torres Strait Islander Health Survey included a hearing test, which demonstrated that 43 per cent of Indigenous Australians aged seven and over had measurable hearing loss.²⁵ Non-Indigenous Australians tend to develop hearing loss with age, but Indigenous Australians often acquire hearing loss in childhood.²⁶ Indigenous Australians over the age of 40 have nearly three times the rate of vision loss of other Australians.²⁷
- 3.17 Lack of access to and lower uptake of health services are key factors that cause this disparity, according to the AIHW.²⁸ The AIHW highlighted eye health and hearing health as 'key challenges' for Aboriginal people in its 2020 report on health in Australia.²⁹

19 Department of Premier and Cabinet (Vic), *Population Diversity in Victoria: 2016 Census* (Report, 30 May 2018) 19.

20 See, eg William Hewitt, *Court Interpretation: Model Guides for the Policy and Practice in the State Courts* (Report No 167, National Center for State Courts, 1995) 161–2. See also Office for Disability Issues, 'Some Differences in Deaf People Using Interpreters', *New Zealand Office for Disability Issues* (Web Page) <<https://www.odl.govt.nz/nzsl/tools-and-resources/some-differences-in-deaf-people-using-interpreters/>>.

21 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 36, 88.

22 *Juries Act 2000* (Vic) sch 2 cl 3(f).

23 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia—Stories from the Census, 2016* (Catalogue No 2071.0, 23 May 2019).

24 Australian Bureau of Statistics, *Disability, Ageing and Carers Australia: Summary of Findings* (Catalogue No 4430.0, 24 October 2019).

25 Australian Institute of Health and Welfare, *Australia's Health 2020: In Brief* (Australia's Health Series No 17, Catalogue No AUS 232, 2020) 62 <<https://www.aihw.gov.au/reports/australias-health/australias-health-2020-in-brief/summary>>. This survey collected information from Aboriginal and Torres Strait Islander people of all ages in non-remote and remote areas of Australia, including discrete Indigenous communities. The scope of the survey was all Aboriginal and Torres Strait Islander people living in private dwellings. Interviewers conducted face-to-face interviews in all selected households. An adult was asked to respond on behalf of children aged less than 15 years. The overall coverage of the 2018–19 National Aboriginal and Torres Strait Islander Health Survey was approximately 33% of Aboriginal and Torres Strait Islander persons in Australia: see 'National Aboriginal and Torres Strait Islander Health Survey Methodology, 2018–19 Financial Year', *Australian Bureau of Statistics* (Web Page, 11 December 2019) <<https://www.abs.gov.au/methodologies/national-aboriginal-and-torres-strait-islander-health-survey-methodology/2018-19>>.

26 Australian Institute of Health and Welfare, *Australia's Health 2020: Data Insights* (Australia's Health Series No 15, Catalogue No AUS 231, 2020) 114 <<https://www.aihw.gov.au/reports>>.

27 Joshua Foreman et al, *National Eye Health Survey 2016* (Report, 2016). The National Eye Health Survey used stratified, multistage random-cluster sampling and examined a total of 3,098 non-Indigenous Australians aged 50 years or older and 1,738 Indigenous Australians aged 40 years or older. The age-adjusted prevalence of vision impairment (13.60%) and blindness (0.36%) in Indigenous Australians were both three times higher than in non-Indigenous Australians (4.57% and 0.12%, respectively), cited in Australian Institute of Health and Welfare, *Indigenous Eye Health Measures 2020* (Report, Australian Institute of Health and Welfare, 2020) 1 <<https://www.aihw.gov.au/reports>>.

28 Australian Institute of Health and Welfare, *Australia's Health 2020: Data Insights* (Australia's Health Series No 15, Catalogue No AUS 231, 2020) 114 <<https://www.aihw.gov.au/reports>>.

29 Ibid 111.

CHAPTER 04

Barriers to inclusive juries

22 Overview

22 How the law and practices exclude people

25 Removing potential jurors through challenges

26 Additional barriers to jury service for Aboriginal people

4. Barriers to inclusive juries

There are so many obstacles that blind and low vision people experience, that even those who have a good level of energy and initiative to change things for the better are giving up.¹ —Vision Australia

Overview

- Two key barriers prevent people in the subject groups from being jurors.
- The first is silence in the *Juries Act 2000* (Vic) about the provision and assessment of reasonable adjustments.
- The second is the common law rule that prevents Auslan interpreters and support people from entering the jury room (the '13th person rule').
- Arguably, a third barrier also arises because of prejudice and misconceptions about the ability of people in the subject groups to serve as jurors with adjustments, and poor understanding about how adjustments work in practice. We explore this in Chapter 9.
- The combination of silence in the Act and the 13th person rule means that many people in the subject groups are left with no option other than to seek to be excused from jury duty or be deemed ineligible to serve. Most people in the subject groups are excused from jury duty at the earliest stage of the jury selection process.
- Peremptory challenges and stand asides exercised late in the selection process may also prevent people in the subject groups from serving as jurors.

How the law and practices exclude people

- 4.1 A combination of law and practices prevent many people who are deaf, hard of hearing, blind or have low vision from serving as jurors.

Limitations in the Juries Act

- 4.2 The *Juries Act 2000* (Vic) (the Act) states that, if a person has a 'physical disability that renders the person incapable of performing the duties of jury service' or is 'unable to communicate in or understand the English language adequately', they are ineligible to serve.²

¹ Comment by a person who was deemed ineligible to serve, referred to by Vision Australia: see Submission 10 (Vision Australia).
² *Juries Act 2000* (Vic) sch 2 cls 3(a), (f) respectively.

- 4.3 Reasonable adjustments may enable a person to meet the eligibility requirements of the Act.³ But the Act is silent about the provision of 'reasonable adjustments'. Currently only a few adjustments are provided by the courts that would assist jurors, for example, hearing loops are installed in courtrooms to assist people who use hearing aids. Headphones may also be available for those who are hard of hearing and do not use hearing aids.⁴
- 4.4 In the last five years, Juries Victoria has received 'approximately six enquiries from people with hearing or vision impairments who wished to serve as jurors but for whom adjustments were unable to be provided and who were therefore unable to serve'.⁵
- 4.5 Juries Victoria noted about the provision of adjustments that in the future:
- Where the common law exclusion remains unchanged, other support options may be offered, including but not limited to adjusting seating arrangements to facilitate lip reading, the provision of talk-to-text or other technological supports, the provision of evidence in Braille or large print, and the assistance of fellow jurors (eg assisting a vision impaired individual with navigation around the deliberation room, making a coffee/tea, etc).⁶

The '13th person rule'

- 4.6 A further significant barrier for people in the subject groups is the long-standing common law rule that the jury must be kept separate to preserve the confidentiality of the deliberation process and the validity of a verdict.⁷ It means that the jury should be kept to itself. This is known as the '13th person rule'. A consequence of the rule is that non-jurors (ie the 13th person), including Auslan interpreters or communication supporters, are prohibited from entering the jury room.
- 4.7 The term '13th person rule' is misleading because the Act now provides for more than 12 jurors,⁸ but it remains commonly used. In practice it refers to all non-jurors in the jury room.

The High Court upholds the 13th person rule

- 4.8 In 2016 the High Court upheld the 13th person rule in *Lyons v State of Queensland*.⁹ That case originated in the District Court in 2012, when Gaye Lyons was summonsed to serve as a juror.¹⁰ Although she could lip-read, Ms Lyons required the assistance of an Auslan interpreter to serve. This request was denied.
- 4.9 The High Court held that the 13th person rule prohibited the interpreter from being present during jury deliberations.¹¹ The plurality¹² (Chief Justice French, Justices Bell, Keane and Nettle) stated:

Absent specific statutory provision, the contention that disclosure of the jury's deliberations to an Auslan interpreter is 'allowed by law' must be rejected. The common law has long required that the jury be kept separate ... The presence of a person other than a juror in the jury room during the course of deliberations is an incurable irregularity regardless of whether the person takes any part in the jury's

3 Reasonable accommodations (which we call 'reasonable adjustments') are defined in the Convention on the Rights of Persons with Disabilities as 'necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

4 Submission 14 (County Court of Victoria).

5 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.

6 Submission 13 (Juries Victoria).

7 Sir William Blackstone, *Commentaries on the Laws of England* (Sweet, Maxwell & Son, 21st ed, 1844) vol 3, 375; Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons, 1956) 41–42; Sir William Holdsworth, *A History of English Law* (Methuen, 1938) vol 11, 553–4.

8 See provisions for additional jurors to be empanelled and balloted off: *Juries Act 2000* (Vic) ss 23, 48.

9 *Lyons v State of Queensland* [2016] HCA 38, (2016) 259 CLR 518.

10 Ms Lyons unsuccessfully appealed to the Queensland Administrative Tribunal and its Appeal Division as well as the Queensland Supreme Court and ultimately the High Court. See *Lyons v State of Queensland (No 2)* [2013] QCAT 731; *Lyons v State of Queensland* [2014] QCAT 302; *Lyons v State of Queensland* [2015] QCA 159, 2 QD R 41.

11 *Lyons v State of Queensland* [2016] HCA 38, [33], [38].

12 A plurality opinion has been defined as 'an appellate opinion not having enough judges' votes to constitute a majority but receiving the greatest number of votes in support of the decision. With a plurality decision, the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds': Bryan A Garner et al, *The Law of Judicial Precedent* (Thomson Reuters, 2016) 195, cited in David Ash, 'The Vogue Word "Plurality"' [2018] (Summer) *Bar News: The Journal of the NSW Bar Association*.

deliberations. The prohibition on the presence of a 13th person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views.¹³

- 4.10 The High Court's decision concerned Queensland's *Jury Act 1995*. The plurality considered that the law as it stood 'did not permit an Auslan interpreter to be present during the jury's deliberations'.¹⁴ The plurality identified that its 'conclusion is reinforced by the absence of provision to administer an oath to an interpreter assisting a juror'.¹⁵ Such an oath would address the role of an interpreter, including that they understand Auslan, and that they will not participate in or disclose deliberations. The plurality also referred to the absence of provisions to prevent an Auslan interpreter from publishing information about statements made, opinions expressed, arguments advanced or votes cast in the course of a jury's deliberations.¹⁶
- 4.11 Nevertheless, the plurality left open the possibility that state legislation could allow for the presence of a 13th person in the jury room, noting:
- It may be, as the appellant submits, that the secrecy of the jury's deliberations would not be compromised by the presence of an accredited Auslan interpreter in the jury room during the jury's deliberations.
- 4.12 Following the High Court decision, the President of the Queensland Law Society called for that state's *Jury Act* to be changed.¹⁷
- 4.13 The High Court decision is referenced in the *Victorian Criminal Proceedings Manual*, which confirms the application of the 13th person rule:
- In the absence of express statutory provisions, there is no power for a judge to empanel an interpreter for a juror, or allow a non-juror to be present during jury deliberations. At least in Queensland (and likely also in Victoria), this means that a person who is deaf is not eligible for jury service.¹⁸
- 4.14 The Commission believes it would be relatively straightforward to amend the Act to limit the application of the 13th person rule with appropriate safeguards. (See Chapters 9, 11 and 12.)

Application of the 13th person rule

- 4.15 It is often said that the 13th person rule is the reason why courts do not provide adjustments to enable a person to serve in Victoria. The Act does not say anything about providing reasonable adjustments, which reinforces the position taken by the courts.
- 4.16 Brent Phillips, a deaf Victorian who received a summons for jury duty in 2014, requested an Auslan interpreter to assist him. But he reported that the Juries Commissioner 'explained that they would not be able to provide Auslan interpreters, and that essentially deaf people were not able to serve on juries given the fact our presence on the jury would necessitate a "13th person" which is a breach of jury legislation in Victoria'.¹⁹
- 4.17 In a media interview, Mr Phillips argued that the 13th person rule should not apply to Auslan interpreters, because they are qualified and accredited and abide by a strict code of ethics that includes confidentiality and impartiality.²⁰ Their presence in the jury room would not, therefore, negatively impact jury deliberations.

¹³ *Lyons v State of Queensland* [2016] HCA 38, [33].

¹⁴ *Ibid* [37].

¹⁵ *Ibid* [35].

¹⁶ *Ibid* [36].

¹⁷ Kim Sharnie, 'Deaf Queensland Woman Gaye Lyons Loses High Court Bid to Become Juror', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-woman-gaye-lyons-loses-high-court-challenge-juror/7904324>>. For further commentary on the Lyons case and calls for legal reform see David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332.

¹⁸ Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [7] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>, citing *Lyons v State of Queensland* [2016] HCA 38, [1], [33]–[36].

¹⁹ Sylvia Varnham O'Regan, 'Deaf Victorian Man Denied from Serving on Jury Calls for "Discriminatory" Law to be Changed', *SBS News* (online, 24 November 2014) <<https://www.sbs.com.au/news/article/deaf-victorian-man-denied-from-serving-on-jury-calls-for-discriminatory-law-to-be-changed/cvjppq9j2>>.

²⁰ *Ibid*.

There are too many barriers to jury service

- 4.18 A person in the subject groups who cannot undertake jury duty unless reasonable adjustments are provided currently has limited options. They can either seek to be excused, or the court (or Juries Victoria) deems them ineligible to serve.
- 4.19 Vision Australia noted that:
- When people who are blind or have low vision seek an exemption from jury service, it is most likely because they anticipate that their needs for reasonable adjustments will not be met, and that they will therefore face insurmountable frustrating barriers.²¹
- 4.20 Vision Australia concluded that in practice, 'very few people who are blind or have low vision have served on juries anywhere in Australia during the last 30 years'.²²
- 4.21 People in the subject groups are generally excused from jury service in response to the questionnaire (the jury eligibility form) at the earliest stage of the selection process. A handful of people are excused later, in response to the summons.²³
- 4.22 The current jury selection forms do not ask for information about disability or enquire what adjustments might assist people to serve.²⁴ The questionnaire only asks whether a person wishes to be permanently excused due to advanced age or medical reasons, or excused on a particular occasion for medical reasons.²⁵ The Commission understands that most people in the subject groups identify that they have a disability in the 'medical reasons' section of the form, and generally raise the issue of disability themselves with Juries Victoria.²⁶
- 4.23 Juries Victoria responds to these requests on a case-by-case basis. It often speaks with the person via an interpreter service or on the phone to discuss the expectation the courts have of jurors and the person's concerns. Sometimes a medical certificate is required to support a request to be excused because of disability.²⁷

Removing potential jurors through challenges

- 4.24 The other way that people in the subject groups may be excluded from jury service is through challenges at the end of the jury selection process. A range of challenges are available in jury trials. The two challenges we consider in this inquiry are 'peremptory challenges' and 'stand asides'.²⁸ They are available at the final stage of the selection of the jury (see Chapter 17). Parties and the Crown can challenge potential jurors without giving reasons. These challenges prevent a potential juror from serving on the trial. If a person is challenged, they return to the jury pool and may be selected for a panel on a different trial.
- 4.25 Section 37 of the Act also provides for an unlimited right to 'challenge for cause' in a criminal trial. This type of challenge requires a party to provide a reason to the trial judge as to why the potential juror should not be a part of the jury.²⁹

21 Submission 10 (Vision Australia).

22 Ibid.

23 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020. Vision Australia commented in its submission that when people who are blind or have low vision are summonsed for jury service, they either seek an exemption at the earliest stage of the process, or else are excluded or deemed ineligible at a later stage. Vision Australia noted that 'it may be that people who have low vision are marginally less likely to be prima facie excluded than people who are blind': Submission 10 (Vision Australia).

24 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.

25 Ibid. Information about the questionnaire is set out in the *Juries Act 2000* (Vic) s 20.

26 Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020; *Juries Act 2000* (Vic) s 20.

27 Information provided by Juries Victoria to Victorian Law Reform Commission, 9 June 2021.

28 *Juries Act 2000* (Vic) ss 35, 38, 39.

29 The Judicial College explains that a 'challenge for cause may be exercised if there is a risk that a potential juror is not impartial as between the accused and the Crown; or a potential juror is not qualified to sit as a juror': Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [54] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>, citing *Bush v The Queen* (1993) 43 FCR 549, (Federal Court of Australia, Davies, Miles and Drummond JJ, 2 August 1993); *R v Judge of District Courts; Ex-parte Attorney-General (Qld)* [1991] 1 Qd R 170, (Supreme Court Queensland, Kelly SPJ, Connolly and Dowsett JJ, 13 June 1990).

Additional barriers to jury service for Aboriginal people

- 4.26 In Chapter 3 we noted that Aboriginal people are more likely to be deaf, hard of hearing, blind or have low vision than other Victorians. Aboriginal people from the subject groups may face additional barriers to jury service.

Aboriginal people's access to disability services

- 4.27 The Victorian Aboriginal Community Controlled Health Organisation (VACCHO) told us that access to disability services is more difficult for Aboriginal people than non-Aboriginal people:

One of the biggest barriers [for Indigenous health] is the disability service system. It is very difficult to navigate these systems and it is hard for Aboriginal people to gain equitable access to services through the NDIS.³⁰

- 4.28 This may mean that many Aboriginal people in the subject groups do not have access to the technological supports available to people in the broader community.³¹ This is likely to limit their participation as jurors.

Higher rates of incarceration may mean that fewer Aboriginal people are eligible to be jurors

- 4.29 A person is disqualified (usually for a limited period) from jury service if they have been convicted of specified serious offences or are on bail/remand or undischarged bankrupts.³²
- 4.30 In 2019, the Australian Law Reform Commission noted in response to the Committee on the Rights of Persons with Disabilities' periodic review of Australia's compliance with the Convention on the Rights of Persons with Disabilities that:
- People with disability, particularly Aboriginal and Torres Strait Islander peoples with disability, are overrepresented in the criminal justice system in Australia.³³
- 4.31 The Australian Law Reform Commission reported in 2017 that, while Aboriginal and Torres Strait Islander adults make up around two per cent of the national population, they constitute 27 per cent of the national prison population.³⁴
- 4.32 In Victoria, the imprisonment rate for Aboriginal people is significantly higher than the rate for the total Victorian population. The Sentencing Advisory Council identifies that the 'Aboriginal and Torres Strait Islander imprisonment rate almost doubled between 2011 and 2021, from 965.2 to 1903.5 per 100,000 adults. Overall, Victoria's imprisonment rate also grew, albeit to a smaller extent, from 110.2 in 2011 to 138.7 [per 100,000 adults] in 2021'.³⁵
- 4.33 Disproportionately high rates of incarceration for Aboriginal people mean that there is a greater likelihood of disqualification from service under the Act.

30 Consultation 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)).

31 Ibid.

32 *Juries Act 2000* (Vic) sch 1.

33 Australian Human Rights Commission, Submission to United Nations Committee on the Rights of Persons with Disabilities, *Information Concerning Australia's Compliance with the Convention on the Rights of Persons with Disabilities* (25 July 2019) 18, [60]. This includes children with disability, who are similarly overrepresented in the juvenile justice system. See also Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (Report, February 2014); Law Council of Australia, *People with Disability* (The Justice Project, Final Report Part 1, August 2018); Human Rights Watch, *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia* (Report, 6 February 2018).

34 Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 40 [1.16].

35 Sentencing Advisory Council (Vic), 'Victoria's Indigenous Imprisonment Rates', *Sentencing Statistics* (Web Page, 28 April 2022) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>>.

Aboriginal people may be wary about participating in the justice system

4.34 VACCHO explained to the Commission that Aboriginal people with disabilities face two layers of discrimination:

- 1) institutional discrimination against Aboriginal people due to their race;³⁶ and
- 2) discrimination on the basis of disability.³⁷

4.35 VACCHO observed that:

Aboriginal people often don't trust the justice system. Many have had negative experiences with the law. There is a long history of systemic and institutional discrimination against Indigenous people. The legal system is often associated with institutionalisation and intervention. As a result, many Aboriginal people try to get out of jury duty.³⁸

4.36 The Commission agrees with the view of VACCHO, which emphasised the importance of Aboriginal people in the subject groups serving as jurors:

As Aboriginal people, we often see ourselves as victims of the court system. But we're also members of the community and need to be part of the justice system by serving on juries.

Traditionally courts have been places where people go in and don't go out, but here we're talking about serving the community. This is a different relationship with the criminal justice system.³⁹

4.37 We also agree with the Queensland Law Reform Commission which concluded that it was 'critical that steps be taken to increase Indigenous participation in the jury system ... not only to increase the representativeness of juries, but also to reduce the sense of exclusion from the criminal justice system that is experienced by many Indigenous people.'⁴⁰ We discuss this further in Chapter 18.

³⁶ See, eg, Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' [2016] 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 26.

³⁷ Consultation 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)). The CRPD also notes concerns about 'the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, ... indigenous ... or other status'. See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Preamble.

³⁸ Consultation 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)).

³⁹ Ibid.

⁴⁰ Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) Executive Summary, v [14].

CHAPTER 05

The slow road to inclusive juries

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5. The slow road to inclusive juries

*This meeting is a waste of time ... We are not asking for a privilege; we are asking for a very unpleasant right ... We think it is work we should be doing and it is our right to do it.*¹ —Comment by a woman to a New South Wales Committee in the 1940s

Overview

- The jury that we are familiar with today has only emerged recently.²
- Who can be a juror has changed over time. Women and Aboriginal people have only gained the right to participate in jury service quite recently.
- For decades there have been calls to enable people in the subject groups to serve as jurors. Parallels can be drawn between the arguments that slowed change for women and those stalling reform for people who are deaf, hard of hearing, blind or have low vision.
- Community responses support reform to remove barriers to jury service for people in the subject groups.

The evolution of the jury

- 5.1 This chapter provides a brief summary of the evolution of the jury. It is instructive to consider the reforms we are proposing in the light of these historical developments.
- 5.2 The British Parliament, in formulating the Bill of Rights of 1689, defined the jury as 'one of the "ancient liberties", a precondition to a constitutional monarchy'.³ However, while the jury is ancient, it has changed enormously over time. As Horan puts it:
- the present form of the civil jury bears little resemblance to earlier manifestations. Since the twelfth century the juror has undergone a metamorphosis from representative of the feudal lords, to local community representative, to impartial trier of fact and representative of the general community. Intimacy has been replaced by objectivity. Whilst the image of the jury for contemporary Australians is an image of an institution that has always been there to protect all citizens, the history of the institution shows otherwise.⁴

1 Quote by a 'well-known Labour woman' to a 'NSW deputation in the 1940s', cited in Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>.

2 The Parliamentary Law Reform Committee outlines the historical evolution of the jury trial in Australia: Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3, 3–36.

3 Jacqueline Horan, 'Perceptions of the Civil Jury System' (2005) 31(1) *Monash University Law Review* 120, 125.

4 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 11.

- 5.3 Juries were first introduced to England after the Norman Conquest during the period 1066–1075.⁵ Initially a jury was used for administrative purposes at the request of the king and for the benefit of the Crown.⁶ Only during the 12th century did they come to be used in the administration of justice.⁷
- 5.4 Over time, the jury evolved from a body of witnesses who decided cases on the basis of their own observations to a body that 'exercised independent judgement according to evidence presented in court'.⁸ Juror challenges were introduced to guard against juror bias.⁹ Special juries, consisting of jurors wealthier than common jurors or chosen for their specialist professional knowledge, were also used.¹⁰
- 5.5 Further changes occurred in the 17th century, when jurors were held to be immune from judicial punishment.¹¹ Horan observes that 'as juries became more independent of judges, they became more reflective of the community's views about justice'.¹² Today, a jury is regarded as an important check on the power of the state (see Chapter 2). Juries enable the community to participate in the justice system and ensure that justice is administered in line with community standards.
- 5.6 Eligibility requirements for jurors have also changed over the centuries, though this change has been very slow. Since juries were first introduced to England, the role of a juror has primarily been performed by wealthy white men.

Australia's first juries

New South Wales

- 5.7 The introduction of the jury system in Australia 'did not simply involve the early colonists importing the English system'. It was 'a gradual process, with many modifications'.¹³
- 5.8 Initially, instead of jury trials, serious criminal offences were heard before an inquisitorial tribunal comprising six military or naval officers and a deputy judge advocate.¹⁴ There was great unease about 'the advisability of having trial by jury in a colony composed of largely ex convicts'.¹⁵
- 5.9 A campaign by free settlers for the introduction of jury trials gathered momentum gradually during the early 19th century. Campaigners considered jury trials important because of the 'threat to judicial independence posed by the British government's power to dismiss colonial judges' and because of concerns about a lack of impartiality by military officers in cases involving the military.¹⁶ The call to include free convicts as jurors faced strong opposition from the British government.¹⁷

5 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.29]. See also Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 10.11.

6 For example, in 1086, William I used the jury system to collect information for the Domesday Book, a survey of wealth and assets across England and parts of Wales: Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.31]–[1.32].

7 Following Henry II's Grand Assize of Clarendon, juries were used to try neighbours suspected of committing crimes as well as to resolve land disputes amongst the nobility: John Guinther, *The Jury in America and the Civil Juror: A Research Project Sponsored by the Roscoe Pound Foundation* (Facts on File Publications, 1988) 11–12, cited in Jacqueline Horan, 'Perceptions of the Civil Jury System' (2005) 31(1) *Monash University Law Review* 120, 123. Trial by jury was fully adopted when Pope Innocent III withdrew support for trial by ordeal in 1215. See Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.35], [1.43], [1.46].

8 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.47].

9 *Ibid* vol 3 [1.50].

10 Some examples of 'special juries' include those made up of merchants, cooks, fishmongers, booksellers, printers, matrons, clerks or attorneys: *ibid* [1.60]–[1.69]; *Juries Act 1825*, 6 Geo IV c 50.

11 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 13, citing *Bushell* (1670) 124 ER 1006.

12 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 13.

13 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.73], citing HV Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal Supplement* 49, 52.

14 Elise Histed, 'The Introduction and Use of the Grand Jury in Victoria' (1987) 8(2) *The Journal of Legal History* 167, 167. The English jury system was first used in Australia in 1789. A special jury of matrons was used in the case of Ann(e) Davis who claimed to be pregnant and sought to avoid a potential death sentence for theft: Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.74], citing AC Castles, 'The Unmarked Bicentennial of Jury Usage in Australia and Some Consequences of Its Decline' (1990) 64 *Australian Law Journal* 509, 506. In 1823 the *New South Wales Act 1823* (UK), 4 Geo IV, c 96 was enacted by the English Parliament. It provided for a 'judge and jury of seven commissioned officers, nominated by the Governor, to try criminal issues before the Supreme Court: see Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.82].

15 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.76].

16 *Ibid*.

17 *Ibid* vol 3 [1.80] referring to a Royal Commission report conducted by John Thomas Bigge in 1823. See also JM Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3(3) *Sydney Law Review* 463, 467.

- 5.10 In 1832, an Act was passed by the Legislative Council of New South Wales prescribing that trials of all civil matters were to be heard before a jury of 12.¹⁸ The Act also allowed for limited use of trial by jury for criminal trials, essentially to address concerns about impartiality of colonial officials or officers.¹⁹ Those 'competent' for jury duty were:

Every male resident in the County of Cumberland, subject to exemptions, aged between twenty one and sixty having real estate producing income of at least thirty pounds annually, or a personal estate worth three hundred pounds [...] Esquires or persons of higher degree, Justices of the Peace, merchants and bank directors were eligible to serve as special jurors.²⁰

- 5.11 In 1839, legislation abolished military trials and allowed criminal trials on issues of fact to be determined by a jury of 12 men.²¹ In 1847, an Act amending the law relating to juries and jurors in New South Wales²² led to jury trials becoming a permanent feature of the administration of justice in New South Wales.²³

Victoria

- 5.12 The Victorian jury evolved from the English jury, modified by early practices in New South Wales. In 1847 the New South Wales juries legislation was applied to the Port Phillip district. It provided for trial by a common jury of 12 free local men. Ordinary jurors were required to have substantial income or property holdings. There was also provision for special juries.²⁴
- 5.13 In 1850, the Parliament of the United Kingdom passed the *Act for the Better Government of Her Majesty's Australian Colonies*, which permitted Victoria to govern itself. In 1851 the State Government of Victoria was established and in 1852 the parliament established the Supreme Court of Victoria.²⁵ Victoria subsequently enacted juries legislation similar to that of New South Wales.²⁶

Eligibility to serve on a Victorian jury

- 5.14 Law makers have either ignored or resisted opportunities to increase the representativeness of juries, particularly in the 19th and 20th centuries. Juries, unlike the broader justice system, seem to have remained shielded from broader social changes.
- 5.15 For more than a century in Victoria, only men of a certain age who owned a specified amount of property were eligible for jury service. The property ownership requirement was removed in 1956, when jury service was extended to 'every man residing in Victoria and enrolled as an elector for the Legislative Assembly'.²⁷ However, women continued to be excluded from juries, as were Aboriginal people. As Simmonds notes, an 'institution that was meant to be the democratic voice of a sovereign community was instead one of the most unrepresentative institutions in Australia'.²⁸

18 *Jury Trials Act 1832* (NSW): see Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.86].

19 Elise Histed, 'The Introduction and Use of the Grand Jury in Victoria' (1987) 8(2) *The Journal of Legal History* 167, 167.

20 JM Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3(3) *Sydney Law Review* 463, 473–4.

21 *Juries Act 1839* (NSW) cl 2 which amended *Jury Trials Act 1832* (NSW). See also Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.88]; JM Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3(3) *Sydney Law Review* 463, 476; Elise Histed, 'The Introduction and Use of the Grand Jury in Victoria' (1987) 8(2) *The Journal of Legal History* 167, 167.

22 *Jurors and Juries Consolidation Act 1847* (NSW).

23 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.90]. The Act rendered all men (subject to exemptions and disqualifications) over the age of 21 resident in the colony and having an annual income of at least 30 pounds or real or personal estate worth 300 pounds liable to serve on civil or criminal juries. A special jury list was retained of people of esquire or higher, Justices of the Peace, bank directors and councillors of the city of Sydney or the town of Melbourne: JM Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3(3) *Sydney Law Review* 463, 481.

24 *Jurors and Juries Consolidation Act 1847* (NSW). See also Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [1.100].

25 'Our History', *Supreme Court of Victoria* (Web Page) <<https://www.supremecourt.vic.gov.au/about-the-court/our-history>>.

26 *Act to Alter the Laws Relative to Jurors and Juries in Certain Districts 1852* (Vic).

27 *Juries Act 1956* (Vic) s 4; Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Issues Paper No 1, November 1994) [2.2.1].

28 Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>. See also Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 208.

The exclusion of Aboriginal people

- 5.16 Choo and Hunter observe that the failure to provide full voting rights in state and federal elections excluded Aboriginal people from electoral rolls and inclusion on the lists from which jurors were drawn.²⁹ In 1962 the Australian Government amended the *Commonwealth Electoral Act* to give Aboriginal people the right to enrol and vote in federal elections irrespective of their voting rights at the state level.³⁰ Only in 1983 was the Electoral Act amended to make enrolling and voting at all elections compulsory for all Australians.³¹ Aboriginal people were finally included as citizens on electoral rolls equally with other electors.³²
- 5.17 Choo and Hunter note that, 'in theory at least', the change in 1983 created 'a base for Indigenous Australians to be fully included in jury lists'.³³ In Chapter 4 we outlined a range of additional barriers that continue to limit participation on juries by Aboriginal Victorians.³⁴ Aboriginal women shared additional barriers with other Victorian women in accessing jury duty. Having fought for the right to be considered citizens, they then had to wait for parliament to be convinced that, as women, they were capable of serving.

A comparable reform: the inclusion of women

- 5.18 Clear parallels can be seen between the arguments that were raised in relation to the participation of women jurors and those raised about people with disabilities.
- 5.19 From the time women in Victoria gained the vote in 1908, the issue of their possible participation as jurors was debated at least seven times in Parliament before they finally achieved the right to participate on equal terms with men in 1977.³⁵ This pattern was similar in every Australian jurisdiction.³⁶ Simmonds points out: 'By the middle of the twentieth century white Australian women could vote, sit in parliament and practise as barristers and solicitors' but they could not be jurors.³⁷
- 5.20 Early progress for women jurors in England and Wales was not mirrored in other common law countries.³⁸ Choo and Hunter's comparative study of 20th century juries in Ireland, Canada, the United States, New Zealand and Australia identifies the 'widespread and pervasive nature of gender discrimination on common law jury eligibility'.³⁹

29 Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 208.

30 'Electoral Milestones for Indigenous Australians', *Australian Electoral Commission* (Web Page, 12 November 2020) <<https://www.aec.gov.au/indigenous/milestones.htm>>. If Indigenous Australians were enrolled, it was compulsory for them to vote as per non-Indigenous citizens. However, enrolment itself was not compulsory.

31 Ibid.

32 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth); 'Electoral Milestones for Indigenous Australians', *Australian Electoral Commission* (Web Page, 12 November 2020) <<https://www.aec.gov.au/indigenous/milestones.htm>>. This followed the 1967 Referendum formally recognising Aboriginal people as Australian citizens: Matthew Thomas, 'The 1967 Referendum', *Parliament of Australia* (Web Page, 25 May 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum>. See also 'Indigenous Australians' Right to Vote', *National Museum of Australia* (Web Page) <<https://www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote>>.

33 Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 208.

34 Choo and Hunter refer to other factors, including low literacy, many living without fixed homes and others living in remote communities: *ibid* 209.

35 See *Women's Qualification Act 1926* (Vic); *Women's Qualification Act 1928* (Vic); *Juries Bill 1956* (Vic); *Juries (Women Jurors) Bill 1958* (Vic); *Juries (Women Jurors) Act 1964* (Vic); *Juries Act 1967* (Vic); *Juries Bill 1975* (Vic).

36 The contrast is particularly stark in South Australia, where women were the first in the world to gain equal rights to vote in 1895 (including Indigenous women) but did not gain equal jury franchise until 1976: see Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 208.

37 Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>.

38 *The Sex Disqualification (Removal) Act 1919* (UK) g & 10 Geo 5, c 71 was the basis for the change to jury franchise for women in England. Section 1 provided that 'a person shall not be exempted by sex or marriage from the liability to serve as a juror'. Despite these reforms women's participation in England was restricted by an ongoing property ownership requirement and through peremptory challenges before they were abolished. The property requirement was not removed until 1972 and peremptory challenges were abolished in 1988: see Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 194–198, 204.

39 Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 193.

- 5.21 Walker examines the failure of six Bills to provide women with the opportunity to serve on juries in Western Australia from 1898 to 1956.⁴⁰ Her research focuses on why those Bills failed and what arguments were used by politicians to justify their support or opposition to amendments to the Jury Act. Walker identifies four key themes raised in the debates:
- women's temperament⁴¹
 - whether women should voluntarily or compulsorily serve⁴²
 - property ownership⁴³
 - the age of service, with some arguing women should only serve when they turned 30 (unlike men who only needed to turn 21).⁴⁴
- 5.22 In Victoria, similar themes were raised when Parliament debated whether to include women as jurors in 1956, 1964, 1967 and 1975.

Generalisations and assumptions about abilities

- 5.23 The debate about women's participation was framed around whether they could perform the role. Old-fashioned generalisations were imposed by men on what women could and could not do. It was thought that women's biology meant that they were not up to serving on juries or were better suited to managing their family responsibilities. Some argued that perhaps this could be corrected with age and experience. Others argued that it was precisely this unique experience that meant that they would make excellent jurors. For example, Mr Cain, Leader of the Opposition, commented in 1956 that:

I have no strong objections to the principle of having women serve on juries. In fact, I believe that there are some women in the community who would probably be equally good as jurors as some men, or even better. There have been some women members of this House who were as capable as the men. In every walk of life there are outstanding women.

... the mere fact that a woman is a mother makes her better than she otherwise would be. Such a person has a keener sense of judgement, more common sense and is more practical than women without children. She has lived the real life.

... But everybody knows that there would be great difficulties in attempting to compel women to serve on juries...

... the vast majority of mothers in the community will not be able, in their most effective years—when they are young, because those are the child-bearing years—to give service on juries.⁴⁵

- 5.24 We look back on these generalisations and misconceptions now and consider them nonsense, as did women campaigners at the time. However, they slowed progress for women for most of the 20th century. Today, people with disabilities face similar prejudices, generalisations and misconceptions (see Chapter 9).

40 Sonia Walker, 'Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114_text.html>. Walker notes that Aboriginal women were not able to serve until 1962 when they were eligible to vote in the Legislative Assembly.

41 *Ibid* [6]–[14].

42 *Ibid* [15]–[18].

43 *Ibid* [20]–[24].

44 *Ibid* [25]–[30].

45 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 August 1956, 3803 (John Cain, Leader of the Opposition).

'A lot of rot!': logistical issues and costs

- 5.25 Logistical issues with the provision of appropriate facilities for women in the courts were also raised to block women's attempts to gain equal jury franchise from the 1940s to the 1970s. One of the key arguments against women being able to serve as jurors was that the 'courts lacked female toilets and it would cost too much money to build them'.⁴⁶ A justice minister commented in 1942: 'The greatest difficulty in the way of anything being done immediately is the provision of accommodation'.⁴⁷ Simmonds notes that a 'well-known Labour woman' responded to the 'toilet objection' in a New South Wales deputation in the 1940s stating:
- A lot of rot! The minister is only pulling your association's leg. Accommodation! ... the government can put an extra lavatory and a bit of a wooden partition in other departments quick enough, why not in the courts?⁴⁸
- 5.26 The Hon. T W Brennan, a staunch supporter of women jurors, commented in parliament in 1956:
- why should not this Government show courage and provide at least a few powder rooms in the Supreme Court buildings during the present reconstruction so that women might be enabled to serve on our juries? We have a notable opportunity in this community in these modern days to follow advanced thinking.⁴⁹
- 5.27 Concerns about enabling jury service for people with disabilities are reminiscent of objections made about women serving without appropriate facilities in the courts. We have heard that the courts will need time to reorganise, pay for and plan to provide adjustments. In a submission to the New South Wales Law Reform Committee (NSWLRC), Justice Hulme argued that permitting blind or deaf persons to serve on juries 'would impose a cost on the community vastly out of proportion to any benefit which could be achieved'.⁵⁰
- 5.28 In Chapter 6 we discuss how Australia defends its decision not to provide adjustments to deaf prospective jurors in its response to United Nations decisions. It refers to practical concerns about trial delay and added complexity and costs.⁵¹ While these may be valid issues to work through, they should not preclude reform. In this report we conclude that the benefits, including compliance with Australia's international human rights obligations, outweigh the costs of reform.

46 Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>. Similarly, in NSW, even by 1977, 'on the eve of New South Wales women gaining full jury franchise, the failure to provide women's toilets was still treated as an impediment to women in 8–10 New South Wales Jury Districts': Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 207, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 February 1977, 4477 (Francis Walker, Attorney-General). This was despite complaint: see, eg, 'Judicial Lack of Facilities', *Tribune* (Sydney, 3 September 1974) 12.

47 Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>. Similarly, in Ireland, Choo and Hunter identify that Beatrice Dixon, a member of the Irish Housewives Association, was remarkably included on a jury panel in 1955, despite numerous 'layers of resistance a woman in 1955 faced when seeking to participate on a jury'. In a letter to the editor of 'The Irish Times', Dixon reported being informed that the inadequacy of female toilets for jurors was 'one of the administrative difficulties of accepting women jurors': Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 205.

48 Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>.

49 Victoria, *Parliamentary Debates*, Legislative Council, 18 September 1956, 4027 (Thomas William Brennan).

50 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 35, citing Justice Hulme, Supreme Court of New South Wales, Submission to New South Wales Law Reform Commission, *Blind or Deaf Jurors* (20 May 2004). See also New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 6.

51 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) [12]; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) [10].

Voluntary or compulsory participation

- 5.29 Debate about women's participation also stalled on the issue of whether jury service should be compulsory for all women or remain voluntary because of their other responsibilities at home. In Chapter 16 we consider similar questions in relation to the right to be excused from jury service because of disability: namely, whether the grounds for excuse should be the same as are available to the broader community or whether special considerations should apply.
- 5.30 In Western Australia, some politicians argued that requiring women to opt in to jury service was wrong. They said it was an 'obnoxious way of bestowing citizen rights to provide that only those who demand them shall be entitled to them'.⁵² Others championed the view that a woman's first responsibility was to the home and family. Therefore, 'it was more straightforward and made more sense administratively if women had to elect to be placed on a jury list'.⁵³ Walker identifies that this raised further concerns about the 'wrong sort of women' opting in to jury service, namely 'battle-axes and sticky beaks'.⁵⁴
- 5.31 In Victoria in 1964 the Juries (Women Jurors) Bill was presented to amend the *Juries Act 1958* (Vic) and the *Women's Qualification Act 1958* (Vic) with respect to jury service by women. The amendments provided that all 'persons' were eligible for jury service not just 'men'. However, women could claim exemption from serving by reason of their sex alone. The Hon. R J Hamer (Minister for Local Government) concluded that the new provisions, including the exemption, represented a compromise because:
- it does not put women in exactly the same position as men. I think it is proper to recognize that women have special duties, including responsibilities to young families, which put them in a somewhat special position and for which special provision ought to be made. I commend the Bill to the House.⁵⁵
- 5.32 It was not until 1975 that the automatic right of exemption from service was removed.⁵⁶ Only since 1977 have women had the right to participate on juries on an equal footing with men in Victoria.⁵⁷ If there are circumstances that mean they cannot serve, then they can apply to be excused in the same way as men. We might also ask why change has not already occurred to enable people with disabilities to serve.⁵⁸
- 5.33 The Commission is aware that even now that women have gained access to juries on an equal footing to men, they are disproportionately challenged as compared to men.⁵⁹ A lower proportion of women on juries was a pattern observed in England prior to the abolition of peremptory challenges.⁶⁰

52 Sonia Walker, 'Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [15] <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114_text.html>.

53 Ibid [16].

54 Ibid [19].

55 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 1964, 1549 (Rupert Hamer).

56 *Juries Amendment Act 1975* (VIC) s 6.

57 Ibid: *Equal Opportunity Act 1977* (VIC) s 57. This section removed the discretion of the Chief Electoral Officer not to include women in the jury list.

58 Walker also suggests that the refusal to accept anything less than equal rights with men may have slowed progress in Western Australia. See Sonia Walker, 'Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [32] <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114_text.html>. Simmonds also discusses the campaign for equal jury franchise: Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>.

59 The Juries Commissioner told us that in 2018 and 2019, 69.5% of peremptory challenges were made against women, compared with 30.5% against men, and juries were made up of 46.6% women and 53.4% men: Information provided by Juries Victoria to Victorian Law Reform Commission, 8 September 2021. See also Alecia Simmonds, 'Friendless in the Courtroom', *Inside Story* (Web Page, 14 May 2021) <<https://insidestory.org.au/friendless-in-the-courtroom/>>. (See Chapter 17).

60 Andrew LT Choo and Jill Hunter, 'Gender Discrimination and Juries in the 20th Century: Judging Women Judging Men' (2018) 22(3) *The International Journal of Evidence & Proof* 192, 193–198.

The exclusion of people in the subject groups

5.34 Early Christian canon law excluded witness testimony from 'blind, deaf and dumb' people.⁶¹ This found its way into English law and was applied to automatically exclude jurors with those disabilities.⁶² Budworth et al observe that 'as with other exclusions from full citizenship ... this is a historical contingency, rather than the result of reasonableness or logic'.⁶³

5.35 From 1847⁶⁴ any 'person who is unable adequately to see, hear or speak' was deemed ineligible to serve as a juror in Victoria.⁶⁵ It was not until 2000 that this wording was removed, when the *Juries Act 2000* (Vic) repealed the *Juries Act 1967* (Vic). Changes were made following the review and recommendations of the Parliamentary Law Reform Committee report, which noted that:

There is a need to recognise that the ability of persons with certain disabilities to carry out the functions of a juror may be affected by the availability of facilities and support. For example, in relation to deaf persons it has been suggested that they could serve on juries if they were provided with the appropriate support, such as a sign language interpreter, or through the use of recent technological advances ... Similar comments have been made in relation to people with a sight impairment ...⁶⁶

5.36 The Committee concluded that:

persons should only be ineligible for jury service if their physical, intellectual or mental disability or disorder makes them incapable of effectively performing the functions of a juror.⁶⁷

5.37 Despite these reforms in 2000 and the policy underpinning them, reasonable adjustments are still not provided to enable people in the subject groups to serve as jurors, and legislation has not been introduced to overcome the 13th person rule.

Community responses: support for reform

5.38 Responses to the consultation paper were overwhelmingly supportive of reform.⁶⁸ For example, Victoria Legal Aid commented in its submission that it:

welcomes change to better enable people who are vision or hearing impaired to serve on juries, where appropriate supports can facilitate effective participation, and ensure that defendants receive a fair trial.⁶⁹

61 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 32.

62 Ibid; *Mansell v The Queen* (1857) 120 ER 20, 30, (1857) 8 EL & BL 52, 79. Budworth et al note that 'Well into the 20th and 21st Centuries, Mansell has been cited with approval in courts in Australia and the United Kingdom': see *Vella v State of Western Australia* [2007] WASCA 59, (2007) 33 WAR 411, [70]; *R v Searle* (1993) 2 VR 367 (Marks and McDonald JJ), (Supreme Court of Victoria, Marks, Hampel and McDonald JJ, 24 June 1993); *Johns v The Queen* (1979) 141 CLR 409, [15] (Gibbs J), (High Court of Australia, Barwick CJ, Gibbs, Stephen, Mason and Murphy JJ, 8 August 1979). See generally *R v Ford* [1989] 1 QB 868; *R v Mason* [1980] 3 All ER 777; *R v Burns* (1883) 9 VLR 191, 193–194 (Supreme Court of Victoria, Stawell CJ, Higginbotham and Holroyd JJ, 6 September 1883). For example, in *R v Ford* it was noted that 'At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury: at 871. This is part of the judge's duty to ensure that there is a fair trial. It is based on the duty of a judge expressed by Lord Campbell CJ in *Mansell v The Queen* as a duty "to prevent scandal and the perversion of justice". A judge must achieve that for example by preventing a juror from serving who is completely deaf or blind or otherwise incompetent to give a verdict': at 30, 81. See further discussion in New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 6–9.

63 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 32.

64 *Jurors and Juries Consolidation Act 1847* (NSW) s 8: required people to be removed from the jury list who 'are disabled by lunacy or imbecility of mind or by deafness blindness or other permanent infirmity of body and also the names of all men of bad fame or of immoral character and repute ...'.

65 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Issues Paper No 1, November 1994) [2.4.12]. The *Juries Act 1967* (Vic) sch 3 cl 2 stated 'Any person who - (a) is unable adequately to see hear or speak' is a person ineligible to serve as a juror.

66 Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1996) vol 1 [3.134]–[3.135]. Notably, despite the Committee's reference to the possible use of interpreters, neither their final report nor the Act addressed the 13th person rule.

67 Ibid [3.140].

68 We note that the Commission received 27 online survey responses to the consultation paper. Two survey responses were not supportive of reform and two were neutral about it.

69 Submission 8 (Victoria Legal Aid).

- 5.39 Similarly, Juries Victoria submitted that 'the jury system and, by extension, the justice system can only be enhanced by more inclusive juries'.⁷⁰
- 5.40 The Supreme Court commented that participation 'where it is consistent with the accused's right to a fair trial, would advance the representativeness of juries and the community's confidence in the jury system'.⁷¹
- 5.41 The County Court stated that:
- with reasonable accommodations, whilst balancing the rights of the accused and other jurors, and the appropriate funding and resourcing, there may be scope for persons in the subject groups to be able to competently discharge their duties as jurors.⁷²
- 5.42 People in the subject groups told us that they want the opportunity to exercise their civic duty. Consultation participants from Deaf Victoria told us:
- Nobody is perfect and so why should we aim for a perfect jury? It adds to the richness of a jury that deaf people are able to serve alongside hearing jurors.
- Just like other members of the community, deaf people need to grow and learn. If we don't have the opportunity to sit on a jury, then we won't have the opportunity to grow and become more experienced members of civil society. It's about playing our part in the community. If we're not seen and not recognised as members of the community, then the community doesn't know what we can do.
- I would love to be on a jury but at the moment I'm excluded.⁷³
- 5.43 Consultation participants from Blind Citizens Australia commented:
- As a blind person, you face very low expectations.
- We often refer to blindness as an information-based disability.
- [Serving on a jury] was something I wanted to do but I didn't have the opportunity to, because I am blind.
- If we want to be regarded as equal citizens, then we should uphold our civic responsibilities.
- There is a tendency for the public to think that inclusion is a service provider's responsibility but actually it's the whole community's responsibility to involve us in society.
- It is important that we are seen to be doing important work because then people will understand our capabilities more.⁷⁴
- 5.44 Daniel Stubbs observed that:
- the project is an important opportunity to allow people with disabilities to be involved in and contribute to the community. If more people with disabilities participate and have access to normal community services/life they are more visible in the community and more likely to be safe.⁷⁵
- 5.45 The Australian Institute of Interpreters and Translators said:
- Just because a person has a disability, it does not mean that they cannot contribute. All people, including those with disabilities, have rights, obligations, and community responsibilities. They should be able to contribute to society.⁷⁶

70 Submission 13 (Juries Victoria).

71 Submission 11 (Supreme Court of Victoria).

72 Submission 14 (County Court of Victoria).

73 Consultation 6 (Deaf Victoria and community participants).

74 Consultation 1 (Blind Citizens Australia).

75 Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

76 Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

5.46 Survey participants agreed:

At the end of the day, we are entitled to serve the same civic duties as everybody else. Why should we pay taxes when we don't have a voice?⁷⁷

I was discouraged from joining in the pool of potential jury members and was advised that being blind, I did not have to participate even though I take my community responsibility seriously and was happy to serve.⁷⁸

Reform is overdue

5.47 As this chapter has explained, the make-up of juries has changed significantly over the years, but often at a glacial pace.

5.48 Change for people in the subject groups has been slow. With the exception of recent changes in the Australian Capital Territory,⁷⁹ progress in Australia seems to have stalled at the point of removing the old blanket exclusion that prevented people with disabilities from serving at all.⁸⁰ As we discussed in Chapter 4, the failure to provide reasonable adjustments or limit the 13th person rule continues to prevent people in the subject groups from serving.

5.49 The same arguments are made today to oppose people with disabilities serving on juries that were previously made about women. They usually focus on the supposed incapacity of the people concerned; logistical challenges such as modifying courtrooms; and the assumed reluctance of people to serve. These arguments are as spurious today as they were in the past.

5.50 Community responses to the consultation paper overwhelmingly supported reform, subject to appropriate fair trial safeguards which we discuss in Chapter 9.

⁷⁷ Online Survey (Response 20).

⁷⁸ Online Survey (Response 1).

⁷⁹ *Juries Act 1967* (ACT) s 16. This section was introduced in 2018.

⁸⁰ However, note that in the Northern Territory a person 'who is blind, deaf or dumb or otherwise incapacitated by disease or infirmity from discharging the duties of a juror' is exempt from jury service. The name of an exempt person must not be included in the jury list: *Juries Act 1962* (NT) s 11, sch 7.

CHAPTER 06

International obligations about the rights of people with disabilities

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- 50 Community responses: Victorian laws should be reformed to respond to the recommendations of the Convention Committee
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6. International obligations about the rights of people with disabilities

*We want a human rights model [for jury duty]; we don't want a discriminatory model. We need to be assessed if we can do a task—not just subjected to people's views on what we can and cannot do.*¹ —Participant in the Blind Citizens Australia consultation

Overview

- Australia is a State Party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The CRPD sets out the rights of people with disabilities and reflects international consensus and standards.
- The United Nations Committee on the Rights of Persons with Disabilities (the Convention Committee) has found that Australia is in breach of its obligations under the CRPD by failing to enable people with disabilities to serve on juries with reasonable adjustments.
- Victoria should act in accordance with the recommendations of the Convention Committee. Our recommendations in Part 2 of this report are guided by those findings.

Australia's obligations under international law

- 6.1 Australia is a party to the seven core international human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD).² The purpose of the CRPD is to:

promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.³

¹ Consultation 1 (Blind Citizens Australia).

² *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN Doc A/RES/2200A(XXI) (16 December 1966); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 January 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1. Article 1 defines 'persons with disabilities' as 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. This is known as the 'social model' of disability. For further discussion, see Chapter 1.

- 6.2 Human rights apply to everyone, including people with disabilities. The CRPD applies human rights specifically to people with disabilities. As Professor Ron McCallum said, the CRPD 'does not grant us new human rights: rather, it recognises that for most of the world's history our human rights, needs and aspirations have been ignored'.⁴ Similarly, Alastair McEwin told us that 'the CRPD is not creating new human rights but looking at [existing] human rights through a disability lens'.⁵
- 6.3 Australia ratified the CRPD on 17 July 2008 and was amongst the first nations to do so.⁶ In ratifying the CRPD, Australia 'joined other countries in a global effort to promote the equal and active participation of all people with disability'.⁷ A total of 185 countries have now ratified and thus become States Parties to the CRPD.⁸
- 6.4 A body of independent experts—the Committee on the Rights of Persons with Disabilities (the Convention Committee)—is responsible for overseeing implementation of the CRPD.⁹
- 6.5 Australia is also party to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.¹⁰ The Optional Protocol enables individuals to make complaints directly to the Convention Committee if they feel that their rights under the CRPD have been violated.¹¹

Implementation of the CRPD in Australia

- 6.6 Article 4(1)(a) of the CRPD requires States Parties to 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention'.¹²
- 6.7 While ratification means Australia is bound to comply with the CRPD, its provisions do not form part of Australian law unless they are specifically incorporated by parliament into domestic legislation.¹³ The CRPD is incorporated in a piecemeal way in Australia through legislation, policy and programs at the federal, state and territory levels and through various institutions.¹⁴

4 Ron McCallum, "Nothing About Us Without Us": National Responses to the CRPD Six Years On' (Speech, The King & Wood Mallesons and Castan Centre Annual Human Rights Lecture, 22 August 2014) 2 <https://www.monash.edu/_data/assets/pdf_file/0010/140986/ron-mccallums-lecture-2014.pdf>.

5 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

6 United Nations, 'Chapter IV 15 Human Rights: Convention on the Rights of Persons with Disabilities', *United Nations Treaty Collection* (Online Collection, 14 June 2022) <<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>>; Ron McCallum, "Nothing About Us Without Us": National Responses to the CRPD Six Years On' (Speech, The King & Wood Mallesons and Castan Centre Annual Human Rights Lecture, 22 August 2014) 2 <https://www.monash.edu/_data/assets/pdf_file/0010/140986/ron-mccallums-lecture-2014.pdf>.

7 Council of Australian Governments, *National Disability Strategy 2010–2020* (Report, 2011) 3.

8 'Status of Ratification Interactive Dashboard', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://indicators.ohchr.org/>>. This is correct as at 17 May 2022. Eight additional countries are signatories to the CRPD, making a preliminary endorsement of the treaty and demonstrating an intent to consider ratifying it. Just five countries have taken no action in relation to the CRPD.

9 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 34; 'Committee on the Rights of Persons with Disabilities', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/en/treaty-bodies/crpd>>. Professor Emeritus Ron McCallum AO, former Chairperson of the Convention Committee, observed that the 'Committee marked a change in the representation of persons with disabilities throughout the United Nations (UN) bodies. Never before had so many persons with disabilities played such significant roles in the human rights treaty bodies system'; Ron McCallum, "Nothing About Us Without Us": National Responses to the CRPD Six Years On' (Speech, The King & Wood Mallesons and Castan Centre Annual Human Rights Lecture, 22 August 2014) 6 <https://www.monash.edu/_data/assets/pdf_file/0010/140986/ron-mccallums-lecture-2014.pdf>.

10 *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006), Annex II Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006.

11 The Optional Protocol was ratified by Australia on 21 August 2009 and came into force on 20 September 2009. It has been ratified by 100 countries and has 26 signatories; 'Status of Ratification Interactive Dashboard', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://indicators.ohchr.org/>>. Correct as at 13 April 2022.

12 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 4(1)(a).

13 *Kioa v West* (1985) CLR 550, 570, (High Court of Australia, Gibbs CJ, Mason, Wilson, Brennan and Deane JJ, 18 December 1985).

14 For a detailed analysis see Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020).

- 6.8 According to Professor McCallum, Australia's ratification of the CRPD has 'acted as a catalyst for the establishment of a national approach to fulfilling the needs and aspirations of persons with disabilities in Australia', including Australia's National Disability Strategy and the National Disability Insurance Scheme.¹⁵
- 6.9 Although it is Australia that is party to the CRPD, the Victorian Government has committed to comply with the CRPD in its new *Inclusive Victoria: State Disability Plan 2022–2026* (see Chapter 7).¹⁶

CRPD rights relevant to inclusive juries

- 6.10 The Convention Committee has identified CRPD rights that are relevant to jury duty:¹⁷
- **Equality and non-discrimination (article 5)**
States Parties to the CRPD must prohibit discrimination on the basis of disability and guarantee equal and effective legal protection against indirect and direct discrimination on all grounds to persons with disabilities. The Convention Committee's view is that Australia must take all appropriate steps to ensure reasonable accommodations are provided to persons with disabilities, including undertaking a 'thorough and objective' assessment of whether accommodations are reasonable.¹⁸
 - **Accessibility (article 9)**
States Parties must take appropriate measures to 'enable persons with disabilities to live independently and participate fully in all aspects of life'.¹⁹ The Convention Committee views performance of jury duty as 'an important aspect of civic life within the meaning of Article 9(1), as it constitutes a manifestation of active citizenship'.²⁰
 - **Effective access to justice, including in relation to the provision of procedural accommodations (article 13)**
The Convention Committee views performance of jury duty as an integral part of the Australian judicial system, and as such, it constitutes 'participation' in legal proceedings.²¹
 - **Freedom of expression and opinion, and access to information (article 21)**
The Convention Committee considers that 'a juror is a person holding a public responsibility in the administration of justice in interaction with others, including other jurors and judicial officers, and that such interaction constitutes "official interactions"²² within the meaning of article 21'.²³

15 Ron McCallum, "Nothing About Us Without Us": National Responses to the CRPD Six Years On' (Speech, The King & Wood Mallesons and Castan Centre Annual Human Rights Lecture, 22 August 2014) 3 <https://www.monash.edu/_data/assets/pdf_file/0010/140986/ron-mccallums-lecture-2014.pdf>. Article 33 requires countries to establish and designate a framework to promote, protect and monitor implementation of the CRPD.

16 Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022) 14.

17 The CRPD articles discussed below are those that the Convention Committee found were breached in the three cases brought by Australians who were deaf and were refused accommodations to serve as jurors (discussed in detail below).

18 Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [7.4] ('*JH v Australia*'). See also Committee on the Rights of Persons with Disabilities, *General Comment No 6: Article 5: Equality and Non Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018). The Australian Government acknowledges that 'article 5 encompasses a prohibition on both 'direct' and 'indirect' discrimination. Direct discrimination occurs when individuals who are similarly situated are unjustifiably treated differently for a reason related to a prohibited ground, while indirect discrimination may occur when a law, policy or practice is neutral on its face but has an unjustified disproportionate impact on certain individuals for reasons related to prohibited grounds': Australian Government, *Background Paper on the United Nations Convention on the Rights of Persons with Disabilities* (Part 1—Australia's Position and Interpretive Approach, Prepared for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 16 June 2020) [21] <<https://disability.royalcommission.gov.au/publications/australian-government-position-paper-uncrpd>>.

19 For further information on the application of Article 9: see Committee on the Rights of Persons with Disabilities, *General Comment No 2: Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014).

20 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) [8.6] ('*Beasley v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [8.6] ('*Lockrey v Australia*').

21 *Beasley v Australia* [8.9]; *Lockrey v Australia* [8.9].

22 Official interactions means dealings with official actors such as government officials. For further discussion, see: Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (Editors), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International, 2017).

23 *JH v Australia* [7.7]. See also *Beasley v Australia* [8.8]; *Lockrey v Australia* [8.8].

- **Participation in political and public life (article 29)**
In conjunction with article 13(1) (access to justice), the Convention Committee considers that attention must be given to 'the participation of persons with disability in the justice system in capacities besides those of claimant, victim or defendant, including in jury service, on an equal basis with others'.²⁴

Australia is in breach of the CRPD

- 6.11 The Convention Committee has considered four complaints from people who were not allowed to participate in jury service in Australia because they were deaf.²⁵ In all but one of the cases,²⁶ the Convention Committee's view was that Australia was in breach of its obligations under international law. It held that reasonable adjustments should have been provided to enable the deaf complainants to serve as jurors.²⁷ The Convention Committee's jurisprudence provides authoritative guidance on the content of those CRPD obligations. As a party to the CRPD, Australia has agreed to take steps to implement its provisions. While Australia cannot be compelled to remedy these breaches, it is obliged to respond to decisions of the Convention Committee (see below).
- 6.12 The Commission has been guided by the decisions of the Convention Committee in framing our recommendations.

The cases of *Beasley* and *Lockrey*

- 6.13 In *Beasley v Australia*²⁸ and *Lockrey v Australia*²⁹ the Convention Committee ruled on the cases of two people, both deaf, who had sought to serve on juries in New South Wales but were excluded because accommodations (Auslan interpreter or captioning) were not provided. The complainants were left without domestic remedies and therefore took their complaints to the Convention Committee.³⁰ We described these cases in Chapter 5 of the consultation paper.³¹
- 6.14 In *Beasley*, the Convention Committee held:
- The refusal to provide an Auslan interpreter or steno-captioning, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounted to disability-based discrimination in violation of Ms Beasley's rights under article 5(1) and (3).³²

24 These rights should also be read in conjunction with the definitions found in Article 2 and the General Obligations set out in Article 4. They were analysed in relation to people with disabilities serving on juries in the cases of: *Lockrey v Australia* [8.g]; *Beasley v Australia* [8.g].

25 *JH v Australia*; *Beasley v Australia*; *Lockrey v Australia*; Committee on the Rights of Persons with Disabilities, *Views: Communication No 12/2013*, 13th sess, CRPD/C/13/D/12/2013 [2.4], [8.1]–[9] ('*AM v Australia*').

26 In 2013, Alastair McEwin, a deaf man who required an Auslan interpreter to undertake jury service, submitted a complaint to the Convention Committee, arguing that while he had never been personally selected for jury service, he 'considers that the practice of the Sheriff of excluding deaf persons from jury duty is discriminatory, and would affect him should he be randomly selected to perform jury duty'. The Convention Committee decided that this case was inadmissible because he had never been selected for jury service, and therefore his complaint was 'hypothetical and insufficient for the author to claim victim status within the meaning of article 1 (1) of the Optional Protocol': *AM v Australia* [8.7].

27 In 2021, the Court of Justice of the European Union heard a case regarding a Bulgarian person who was excluded from working as a juror on a case because she was blind. Applying both the CRPD and European Law, the Court held that her complete exclusion was impermissible and that there should have been 'an evaluation of her individual ability to perform her duties and ... investigation of the possibility of rectifying any difficulties that may arise [by providing reasonable adjustments]': *TC, UB v Komisija za zashtita ot diskriminatsia*, VA (Court of Justice of the European Union, Second Chamber, C-824/19, 21 October 2021) [56]. We note that jurors are paid employees in Bulgaria, unlike in Victoria where jury duty is a civic responsibility. However, the application of the CRPD by the Court of Justice of the European Union is in line with the Convention Committee's interpretation of the CRPD, which informs our recommendations in this report. See also *TC, UB v Komisija za zashtita ot diskriminatsia*, VA (Opinion of Advocate General Saugmandsgaard Øe, Court of Justice of the European Union, C-824/19, 22 April 2021). For case commentary: see Lisa Waddington, 'Komisia Za Zashtita Ot Diskriminatsia (HvJ EU, C-824/19)—No Blanket Exclusion of Blind Person from Being Employed as a Juror', *European Human Rights Cases Updates* (Web Page, 14 January 2022) <<https://www.ehrc-updates.nl/commentaar/211849>>.

28 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) ('*Beasley v Australia*').

29 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) ('*Lockrey v Australia*').

30 Under the *Disability Discrimination Act 1992* (Cth) and the *Anti-Discrimination Act 1977* (NSW) it was not unlawful to discriminate against them on the basis of disability in the 'area of civic duties' or 'in areas of public life', which includes jury duty; *Beasley v Australia* [7.3]–[7.4]; *Lockrey v Australia* [7.3]–[7.4].

31 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) [5.23]–[5.27].

32 *Beasley v Australia* [8.3]–[8.5].

- Article 9(1) was breached because Australia failed to take appropriate measures to 'enable persons with disabilities to live independently and participate fully in all aspects of life'. The Convention Committee noted that jury duty is 'an important aspect of civic life within the meaning of article 9(1) as it constitutes a manifestation of active citizenship'.³³
 - Australia failed to uphold article 21(b), which protects freedom of expression and access to information, including in 'official interactions' because Australia refused to provide Beasley with 'the format of communication she needs to enable her to perform jury duty and therefore to express herself in official interactions'.³⁴
 - Refusing to provide an Auslan interpreter amounted to a denial of access to justice (article 13) in conjunction with the right to participate in public life (article 29(b)). The Convention Committee took a broad view of access to justice, noting that it should extend to the 'participation of persons with disabilities in the justice system in capacities besides those of claimant, victim or defendant, including in jury service, on an equal basis with others'.³⁵
- 6.15 The Convention Committee recommended that Australia enable participation in jury duty by providing 'reasonable accommodation in the form of Auslan interpretation in a manner that respects the confidentiality of proceedings at all stages of jury selection and court proceedings'.³⁶ Additionally, the following steps were recommended:
- ensuring that every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of their request for adjustment is carried out and all reasonable accommodation is duly provided to enable their full participation
 - adopting the necessary amendments to the relevant laws, regulations, policies and programmes, in close consultation with persons with disabilities and their representative organisations
 - ensuring that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to local authorities, such as the sheriff, and the judicial officers and staff involved in facilitating the work of the judiciary.³⁷
- 6.16 Similar findings were made in *Lockrey v Australia*.

The case of JH

- 6.17 The most recent case regarding disability and jury service against Australia considered by the Convention Committee arose in 2018, following the complaint of Perth resident, JH, who was born deaf and uses Auslan.³⁸
- 6.18 JH was summonsed to serve as a juror in the Western Australia District Court. She notified the Department of the Attorney-General³⁹ that she required an Auslan interpreter and provided the details of an interpreter booking service.⁴⁰
- 6.19 The Manager of Jury Services excused JH from her summons because the court was unable to provide her with an Auslan interpreter due to:
- 1) the requirements of the *Juries Act 1957* (WA);⁴¹ and
 - 2) the overriding necessity of affording a fair trial to the accused, including the preservation of secrecy of jury deliberations.⁴²

33 Ibid [8.6].

34 Ibid [8.7]–[8.8] This amounted to a violation of article 21(b) read alone and in conjunction with articles 2, 4, and 5(1) and (3) of the CRPD.

35 Ibid [8.9]. The Committee considered that the decision of the sheriff not to provide Auslan interpretation amounted to a violation of article 13(1) read alone and in conjunction with articles 3, 5(1), and 29(b) of the CRPD.

36 Ibid [9(a)].

37 Ibid [9 (b)].

38 *JH v Australia* [2.1].

39 This is the department in Western Australia that sends out the summons for jury duty.

40 *JH v Australia* [2.1].

41 Section 34G: General powers to excuse summoned people: (1) A judge or summoning officer may excuse a person under this section when he/she (e) does not understand spoken or written English, or cannot speak English, well enough to be capable of serving effectively as a juror; or (f) is not capable of serving effectively as a juror because he or she has a physical disability or a mental impairment, the judge or summoning officer must excuse the person from the summons.

42 Ibid [2.4].

- 6.20 The main rationale for this decision was 'to provide a system that was fair to the accused and complies with applicable legislation'.⁴³
- 6.21 Australia presented the following arguments to the Convention Committee about why this decision was reasonable:
- It 'did not take a blanket approach' in excusing JH from jury duty but considered her circumstances, enquired into her assistance requirements and, based on that information, determined that she was 'not capable of serving effectively as a juror' under domestic law.⁴⁴
 - The relevant domestic law 'establishes a legitimate differential treatment of people who require an interpreter and thus is not discriminatory under article 5(2) of the Convention'.⁴⁵
 - The provision of an Auslan interpreter is not feasible in cases that involve non-verbal audio evidence, or are scheduled for many weeks, and that interpreters added complexity and cost to trials, as well as interfering with the secrecy of jury deliberations.⁴⁶ The provision of an Auslan interpreter was therefore considered not to be an 'appropriate measure' given 'the overriding necessity to ensure a fair trial'.⁴⁷
- 6.22 As in the *Beasley* and *Lockrey* decisions, the Convention Committee was not persuaded that the provision of an Auslan interpreter would amount to a 'disproportionate or undue burden'. The Convention Committee noted that 'Auslan interpretation is a common accommodation, largely used by Australian deaf people in their daily life', and that JH 'indicated to the State Party's authorities how to book Auslan interpreters when she informed them about her hearing impairment'.⁴⁸
- 6.23 The Convention Committee decided that Australia had not 'taken the necessary steps' to ensure reasonable accommodations were made to enable JH to serve. It concluded that:
- the refusal to provide Auslan interpretation, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounts to discrimination on the basis of disability.⁴⁹
- 6.24 The Convention Committee reiterated that Australia had not justified its concerns about confidentiality in jury deliberations, as these could be addressed by requiring interpreters to take a 'special oath' to preserve the secrecy of jury deliberations.⁵⁰
- 6.25 Further, the Convention Committee again found that the denial of an Auslan interpreter resulted in a violation of JH's right to freedom of expression and opinion in undertaking 'official interactions' involved in jury duty, amounting to a violation of article 21(b) and (e).⁵¹

Australia's responses to the United Nations decisions

- 6.26 Australia rejected the Convention Committee's decisions in the cases of *Beasley*, *Lockrey* and *JH*. Australia 'does not consider the provision of Auslan interpretation and stenography to potential jurors to be an appropriate measure to ensure accessibility'.⁵²

43 Ibid [2.6].

44 Ibid [4.3]: see *Juries Act 1957* (WA) s 34G(2).

45 *JH v Australia* [4.6].

46 Ibid [4.7].

47 Ibid [4.8].

48 Ibid [7.5].

49 Ibid: By failing to provide reasonable accommodations, Australia violated JH's rights under arts 5(2) and (3) of the Committee on the Rights of Persons with Disabilities.

50 Ibid.

51 Ibid [7.7]. See arts 21(b) and (e) of the CRPD.

52 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 8 [29]; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 1 [6].

6.27 The key practical concerns identified in Australia's responses were:

- The presence of an Auslan interpreter would affect the ability of the jury to deliberate in secret, and it was possible that an interpreter may become an indirect/direct participant in deliberations, or influence their structure, flow or nature.⁵³
- The impact of Auslan interpretation on the duration and complexity of trials, including:
 - a) the impact on continuity of proceedings due to the need to rotate Auslan interpreters⁵⁴
 - b) delays to trials caused by providing reasonable adjustments, including:
 - i. the need for pre-trial preparation of the courtroom⁵⁵
 - ii. additional practice and procedural requirements in the courtroom (eg the requirement for interpreters to rotate at regular intervals, and the need to modify pace of delivery)⁵⁶
 - iii. the need for an assessment of any request for reasonable adjustments to take place after a juror is empanelled on a particular trial, delaying the start of the trial,⁵⁷ and
 - iv. the 'added risk of non-sitting days where an interpreter is unable to attend (particularly in the context of the current skills shortage in this area)'.⁵⁸
 - c) an Auslan interpreter would introduce an element of subjective interpretation because a deaf juror will not be able to make their own direct assessment of evidence, but would instead need to rely on the interpretation of the interpreter⁵⁹
 - d) difficulties associated with interpreting complex technological evidence (e.g. body-worn video equipment; telephone intercepts)⁶⁰
- The cost of providing reasonable accommodations, including Auslan interpreters⁶¹ 'with no certainty that a deaf juror would be ultimately selected'.⁶²

53 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 3 [10].

54 Ibid; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 4 [12].

55 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 4 [16].

56 Ibid; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 4 [12].

57 The Australian Government further comments that: 'While the Committee has recommended that the State party ensure a comprehensive assessment be carried out every time a person with disabilities is summoned to perform jury duty, in NSW jurors are not summoned for a particular trial – rather they are summoned for a particular court for a particular date. A number of potential trials could be ready to commence that day, so an assessment could not be made until the juror is empanelled and the specifics of that trial are known, delaying the start of the trial'. Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 4 [16].

58 Ibid 5 [16].

59 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 4 [12]. Similar comments were made in response to Beasley and Lockrey's cases: Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 3 [13]. See further discussion in Chapter 9.

60 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 3–4 [12]–[13]; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 2–3 [9]. 4 [12].

61 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) 4 [10].

62 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) 4 [15].

Australia's report to the Convention Committee

- 6.28 States Parties to the CRPD must deliver a report to the Convention Committee two years after ratification, and then every four years.⁶³ The reports detail how the country is implementing the CRPD.
- 6.29 Australia's most recent report was made in 2018. Regarding access to justice, it referred to recent reforms in the ACT to 'facilitate the provision of reasonable support to jurors with disabilities participating in the jury process'.⁶⁴ Australia also reported reforms in the Federal Court to 'harmonise the regulation of the Court's jury composition with the Convention'.⁶⁵
- 6.30 In 2019, the Convention Committee's concluding observations (in reply to the report from the Australian government) expressed concern about Australia's treatment of potential jurors with disabilities, observing that:
- only some states and territories have passed legislation to support the equal participation of persons with disabilities in the jury system, while the rest and the federal Government have not done so.⁶⁶
- 6.31 The Convention Committee recommended that Australia ensure effective access to justice⁶⁷ through the development of legislation in all states to ensure 'equal participation of persons with disabilities in the jury system'.⁶⁸ Australia should do this 'in close consultation with persons with disabilities, through their representative organizations, [to] ensure effective access to justice for persons with disabilities, without any discrimination'.⁶⁹

United Nations principles and guidelines on the rights of persons with disabilities

- 6.32 The 2020 *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (the Principles and Guidelines) were issued by the UN Special Rapporteur on the Rights of Persons with Disabilities.⁷⁰ Their purpose is to guide states on how to remove barriers to justice for people with disabilities.⁷¹ They specifically relate to access to jury duty and have therefore also informed the recommendations in this report.

63 Article 35 provides: 1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned. 2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests: *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

64 Committee on the Rights of Persons with Disabilities, *Combined Second and Third Periodic Reports Submitted by Australia under Article 35 of the Convention* (UN Doc CRPD/C/AUS/2-3, 7 September 2018) 27 [174]–[175] <<https://digitallibrary.un.org/record/1663867?ln=en>>.

65 Ibid [174]–[175].

66 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [25] (a).

67 Ibid [26]; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13.

68 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [26].

69 Ibid.

70 United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Human Rights Special Procedures, Special Rapporteur on the Rights of Persons with Disabilities, 2020). The Human Rights Council first established the mandate on the rights of persons with disabilities in 2014. This mandate was created to: a) Strengthen efforts to recognise, promote, implement and monitor the rights of persons with disabilities from a human rights-based approach, in line with the Convention of the Rights of Persons with Disabilities and the broader human rights framework; and b) Recall the universality, indivisibility, interdependence and interrelatedness of all human rights and the need for persons with disabilities to be guaranteed the full enjoyment of these rights without discrimination: 'Special Rapporteur on the Rights of Persons with Disabilities', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SRDisabilitiesIndex.aspx>>.

71 The Principles and Guidelines provide a 'practical tool to support States in designing and implementing justice systems that provide equal access to justice for persons with disabilities, in line with international human rights standards': United Nations, 'International Principles and Guidelines on Access to Justice for Persons with Disabilities', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>>.

- 6.33 Principle 7 concerns the rights of persons with disabilities to 'participate in the administration of justice on an equal basis with others'.⁷² This principle outlines states' obligation to ensure that persons with disabilities can participate as jurors.⁷³
- 6.34 The guidelines accompanying Principle 7 outline steps that the state and other authorities, including 'judicial councils and other judicial governing bodies', may take to facilitate the participation of disabled people on juries, including:
- removing all barriers, including legislation that prevents persons with disabilities from serving as jurors⁷⁴
 - ensuring that persons with disability can participate on an equal basis in the jury system by ensuring the provision of 'all necessary support, reasonable accommodations and procedural accommodations'⁷⁵
 - strengthening reform strategies by collecting disaggregated data on persons with disabilities and participation in the justice system.⁷⁶
- 6.35 States should also provide legally mandated training on the rights of persons with disabilities and provide accommodations to everyone with a role in the administration of justice.⁷⁷
- 6.36 Having reviewed these Principles and the Convention Committee's jurisprudence, Remedy Australia concludes that:
- There can be no doubt, from treaty-body jurisprudence and the most authoritative interpretations of international law, that Australia's obligation is to provide reasonable accommodations in our courts—including interpreters and steno-captioners—to enable people with disabilities to participate in our juries and public life on an equal basis with others.⁷⁸

Community responses: Victorian laws should be reformed to respond to the recommendations of the Convention Committee

- 6.37 Community members told us that they want Victoria's jury laws to be reformed so they are in line with international human rights laws. For example, a participant in our consultation with Deaf Victoria commented:
- It is important that deaf/hard of hearing people can take part in the legal system and feel equal to the rest of the community. This is a human rights issue because deaf people have been excluded from the community for such a long time.⁷⁹
- 6.38 The Castan Centre for Human Rights Law (Castan Centre) identified that the 'issue of inclusive juries goes to the heart of what [the CRPD] stands for, including the fundamental values of equality, dignity and liberty'.⁸⁰ Many responses to the consultation paper called for reform so that our laws comply with international legal standards.⁸¹ The Youth Disability Advocacy Service submitted:

72 United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Human Rights Special Procedures, Special Rapporteur on the Rights of Persons with Disabilities, 2020) 22, principle 7.

73 Ibid 22, principle 7.1.

74 Ibid 22, principle 7.2(b).

75 Ibid 22, principle 7.2(c).

76 Ibid 22, principle 7.2(e).

77 Ibid principle 10.2(a), 10.2.

78 Eliza Nugent, Preyasi Domun and De Alwis Winuri, *Advancing Jury Inclusivity in Australia* (Report, Remedy Australia, Castan Centre for Human Rights Law, Monash University, August 2021) 7–8.

79 Consultation 6 (Deaf Victoria and community participants).

80 Submission 12 (Castan Centre for Human Rights Law, Monash University) 11. Similar observations were made by Eliza Nugent, Preyasi Domun and De Alwis Winuri, *Advancing Jury Inclusivity in Australia* (Report, Remedy Australia, Castan Centre for Human Rights Law, Monash University, August 2021) 4.

81 Consultations 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity), 6 (Deaf Victoria and community participants); Submissions 2 (Dr David Squirrell), 9 (Madison).

Having ratified the Convention on the Rights of Persons with Disabilities, Australia is obliged to ensure that disabled citizens enjoy and exercise the same rights as every other citizen. This includes ensuring that disabled citizens can participate fully in all aspects of public life. By failing to provide adjustments to deaf and blind Australians to participate as jurors, Australia has violated the human rights of those excluded jurors and more broadly, its obligations under the Convention on the Rights of Persons with Disabilities.⁸²

- 6.39 The Castan Centre highlighted that the UN cases 'illustrate that the state of Victoria has obligations under international human rights law to enable the meaningful inclusion and participation of persons who are deaf and hard of hearing'.⁸³ It further identified that those decisions 'provide tangible examples of what needs to change in order to comply with international human rights law, namely, change to law and practices that create barriers to participation and consultation with people with disabilities to guide reform'.⁸⁴
- 6.40 The overwhelming community response was that concerns about cost, inconvenience and added complexity of removing barriers are outweighed by the need for jury service to reflect community standards about inclusion and equality.

Reforms would improve compliance with the CRPD in Victoria

- 6.41 Reforming Victorian legislation and practice to remove barriers to participation for people in the subject groups will be consistent with United Nations' recommendations. The second part of this report makes recommendations that aim to address the practical concerns raised by Australia in response to the UN cases.

82 Submission 3 (Youth Disability Advocacy Service).
 83 Submission 12 (Castan Centre for Human Rights Law, Monash University).
 84 Ibid.

CHAPTER 07

Jury selection should meet today's standards of inclusion

54 Overview

54 Community expectations

55 Equality and non-discrimination in today's society

59 Human rights law, the Charter and jury selection

60 Jury selection should reflect principles of equality and non-discrimination

7. Jury selection should meet today's standards of inclusion

*We're the same as everybody else, we're human, we have kids, we go to work, we drive cars, we pay mortgages—I was just fuming because I could not have equal access to this.*¹ —Gaye Lyons

Overview

- Reform is needed to align the jury empanelment process with community expectations, laws and policies about non-discrimination and the inclusion of people with disabilities in public life.
- Non-discrimination and inclusion are principles and legal standards that permeate our everyday lives as well as the justice system. Jury service should align with these fundamental principles.

Community expectations

- 7.1 Many people may be surprised that the law does not oblige the courts or Juries Victoria to provide reasonable adjustments so that people with disabilities can perform jury service. This is out of step with community expectations. Vision Australia observed that:

Over the past 30 years or so a number of factors have combined to reinforce expectations of full, equal, dignified and independent participation by people with disability in every aspect of life, including civic participation such as jury service.²

- 7.2 Communication tools for people in the subject groups are increasingly visible and familiar in the Victorian community. As technology has improved, accessibility tools have become more sophisticated and the cost of providing them has reduced. With the coronavirus (COVID-19) pandemic we have been making greater use of technology to communicate at work and in our private lives. As Alastair McEwin told us:

Suddenly everyone had to use online services. People with disabilities have been asking for things like flexible learning and work practices for years. Previously it was perceived as all too hard. Now that everyone must face it however, it has been done. This change has been very helpful ... What's good for people with disabilities is often good for everyone. This should be borne in mind when talking about access tools.³

¹ Comment made by Gaye Lyons in response to the Queensland Ipswich District Court's refusal to provide an Auslan interpreter so she could perform jury duty in 2012, cited in Kim Sharnie, 'Deaf Queensland Woman Gaye Lyons Loses High Court Bid to Become Juror', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-woman-gaye-lyons-loses-high-court-challenge-juror/7904324>>.

² Submission 10 (Vision Australia).

³ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

- 7.3 We are now accustomed to seeing Auslan interpreters at press conferences and public events.⁴ We are familiar with speech-to-text technology and captions on Instagram and Facebook. Audio description is provided regularly in television, film and theatre.⁵ Podcasts and audio books are popular across the community. Theatres now stream captioning to a person's phone.⁶ Vision Australia explained that it:
- provides AD [audio description] for over 200 live theatre events, including all major dramas, operas and musicals each calendar year across Australia.⁷
- 7.4 Television and streaming services are incorporating accessibility tools. Companies like Netflix, SBS and ABC provide audio descriptions⁸ which 'give more detail about what's happening on screen, including facial expressions, physical actions, and changes in scene'.⁹ Other accessibility features include brightness controls, font size controls and playback speed controls. Netflix can be navigated with many common screen readers that read text aloud.¹⁰
- 7.5 The benefits of accessibility are also being recognised in the business world.¹¹ Industry is increasingly prioritising social responsibility as a business policy¹² and capturing economic benefits that flow from improved accessibility.¹³

Equality and non-discrimination in today's society

- 7.6 In our report *Guardianship* (2012) the Commission noted that the social context and community attitudes towards disability have changed. That report and the new laws that followed it recognised the importance of equality and citizenship for people with disabilities:
- There is now much greater emphasis upon people with disabilities being supported to be active, participating members of our community. Notions of people with disabilities as passive recipients of services are being replaced with those of people as active citizens of communities, regardless of the nature or extent of their disabilities.¹⁴
- 7.7 People in the subject groups and the broader community expect that the laws and practices that govern jury selection reflect fundamental principles of equality and non-discrimination.

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- 4 Zach Hope, 'But Seriously, I'm Really Nervous': The Everywhere Faces of Auslan Interpreters and Their Vital Work', *The Age* (online, 10 May 2020) <<https://www.theage.com.au/national/victoria/but-seriously-i-m-really-nervous-the-everywhere-faces-of-auslan-interpreters-and-their-vital-work-20200509-p54rcu.html>>; Holly Tregenza, 'The Coronavirus Pandemic and Bushfire Emergency Have Thrust Auslan Interpreters into the Spotlight', *ABC News* (online, 11 April 2020) <<https://www.abc.net.au/news/2020-04-11/coronavirus-bushfires-thrust-auslan-interpreters-into-spotlight/12140824>>. See also Millie Roberts, 'Auslan Interpreters Will No Longer Be a Permanent Part of NSW Press Conferences', *Junkee* (Web Page, 12 October 2021) <<https://junkee.com/auslan-interpreters-nsw-press-conference/311556>>.
- 5 The Australian children's music band 'The Wiggles' is embracing accessibility and improving access for children with disabilities through their music. The Wiggles, 'Emma's Sign Language Time' (YouTube, 16 February 2021) <https://www.youtube.com/playlist?app=desktop&list=PLn4s8rogyEeu5KL4We5jJNTCrG_EEWm31>. See also Naja Later, 'From CODA to Hawkeye, the Surge of Sign Languages on Screen is a Sign of Better Things to Come for the Deaf Community', *The Conversation* (online, 12 April 2022) <<https://theconversation.com/from-coda-to-hawkeye-the-surge-of-sign-languages-on-screen-is-a-sign-of-better-things-to-come-for-the-deaf-community-180304>>.
- 6 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).
- 7 Consultation 28 (National Coordinator of Audio Description, Vision Australia). Similarly, the Service Coordinator of Description Victoria told us that the organisation regularly provides AD services to live theatre performances: Consultation 29 (Service Coordinator, Description Victoria).
- 8 Netflix, 'Accessibility on Netflix', *Help Center* (Web Page) <<https://help.netflix.com/en/node/116022>>; Special Broadcasting Service (SBS), 'SBS and ABC Launch Audio Descriptions to Help Blind or Vision-Impaired Australians Enjoy Television More', *SBS News* (online, 23 June 2020) <<https://www.sbs.com.au/news/sbs-and-abc-launch-audio-descriptions-to-help-blind-or-vision-impaired-australians-enjoy-television-more>>. The Vision Australia submission observes that 'accessible public ICT procurement requirements of the Rehabilitation Act have been pivotal in improving the accessibility of a wide range of technologies, and have even been identified as the catalyst for companies such as Netflix to introduce audio description to their content': Submission 10 (Vision Australia). See also: *Rehabilitation Act*, 29 USC (1973).
- 9 Consultation 30 (Lead Policy Advisor, Client Services, Vision Australia).
- 10 Netflix, 'Accessibility on Netflix', *Help Center* (Web Page) <<https://help.netflix.com/en/node/116022>>.
- 11 See, eg, the discussion about accessible tourism: 'Accessible Tourism', *Business Victoria* (Web Page, 20 April 2022) <<https://business.vic.gov.au/business-information/tourism-industry-resources/accessible-tourism>>.
- 12 For example, Apple is committed to accessibility in its designs because inclusion is 'a human right': Filipe Espósito, 'Apple's Accessibility Director Highlights How the Company Values Inclusion in its Products', *gto5Mac* (Blog Post, 28 July 2020) <<https://gto5mac.com/2020/07/27/apples-accessibility-director-highlights-how-the-company-values-inclusion-in-its-products/>>.
- 13 For example, Moreland City Council's website notes that 'Good access is good business. Nearly one in four Moreland residents have a disability. If your premises are not accessible for everyone you may be missing out on significant numbers of potential customers': 'Make Your Business Accessible', *Moreland City Council* (Web Page) <<https://www.moreland.vic.gov.au/building-and-business/business/accessible-business/>>.
- 14 Victorian Law Reform Commission, *Guardianship* (Report No 24, 2012) Executive Summary, xxi [14].

- 7.8 Exclusion from community life can have a debilitating effect on self-worth and compound feelings of isolation.¹⁵ Victoria Legal Aid noted:
- Through our work responding to disability discrimination, we see the impact on people when they are excluded from participating in community life because adjustments are not made to accommodate their disabilities. Not only does this discrimination have a significant impact on the health and wellbeing of people with disability, it can also impact on their ability to complete their education, maintain their employment and have access to services. Our wider community is also adversely impacted when people with disabilities are denied the ability to fully participate in public life and contribute their diversity of lived experiences to public decision-making processes, including in the justice system.¹⁶
- 7.9 Youth Disability Advocacy Service stated that:
- the current exclusion of disabled Australians as jurors further stigmatises disability within both the criminal justice system and society broadly. It is vital that disabled people living in Victoria are not only seen in the roles of claimants, victims or defendants within Australia's justice system. This perpetuates disability stigma and inequality. Jury service is a vital aspect of civil life and the jury must reflect the society we live in.¹⁷
- 7.10 Whilst there has been some significant progress, the Commission observes that there is a long way to go to achieve equality for people with disabilities. Victoria Legal Aid (VLA) identified that:
- Of the discrimination-related inquiries we received, inquiries about disability discrimination are the most common and each year we provide hundreds of instances of legal advice and assistance about this issue. For example, over the past five financial years we gave 345 advices on disability discrimination in education and 1,803 advices on disability discrimination in employment.¹⁸
- 7.11 The latest 'Australia Talks' survey also suggests that Australians think the country is doing a poor job of supporting people with disabilities and that significant improvements need to be made.¹⁹ Importantly, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability reveals the seriousness with which our community is now treating the challenges people with disability face.²⁰

Government inclusion strategies

- 7.12 At the Commonwealth and state levels, disability action plans outline how government will:
- support people with disabilities to take part in the community
 - make it easier for people with disabilities to use community services.²¹

15 Department of Social Services (Cth), *SHUT OUT: The Experience of People with Disabilities and Their Families in Australia* (Report, 2009) 52.

16 Submission 8 (Victoria Legal Aid).

17 Submission 3 (Youth Disability Advocacy Service).

18 Submission 8 (Victoria Legal Aid).

19 82% of Australians think that Australia should do as much as is necessary to ensure that people with disability have the same opportunities as everyone else. The survey reveals that more voters agree than disagree on this issue across the entire political spectrum. Australian Broadcasting Corporation (ABC), 'Is Enough Being Done in Australia to Support People with Disabilities?', *Australia Talks* (ABC News, 1 June 2021) <<https://www.abc.net.au/news/2021-06-01/is-enough-being-done-to-support-australians-with-disabilities/13368758>>. For more information about this survey: see Australian Broadcasting Corporation (ABC), 'Where Do You Fit?', *Australia Talks* (Web Page) <<https://australiatalks.abc.net.au/>>.

20 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is a royal commission established on 4 April 2019 by the Australian government pursuant to the *Royal Commissions Act 1902* (Cth): 'About the Royal Commission', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <<https://disability.royalcommission.gov.au/about-royal-commission>>.

21 Consultation 7 (Vision Australia).

Commonwealth National Disability Strategy

- 7.13 The Federal Government's *Australia's Disability Strategy 2021–2031*, released in December 2021, 'sets out priorities and plans for all governments to work with the community, business and people with disability' to ensure a more 'inclusive and accessible Australian society where all people with disability can fulfil their potential as equal members of the community'.²² Implementing the strategy will assist governments in meeting their obligations under international and domestic law.²³
- 7.14 The strategy builds on its predecessor, the *National Disability Strategy 2010–2020*, which marked 'the first time in Australia's history that all governments have committed to a unified, national approach to improving the lives of people with disability, their families and carers, and to providing leadership for a community-wide shift in attitudes'.²⁴

Victorian inclusion strategies

- 7.15 The Victorian Government launched a new state disability plan in March 2022. It stated that the new plan 'is a key way for the Victorian Government to be accountable for making all parts of the community inclusive and accessible for everyone'.²⁵
- 7.16 The Victorian Public Sector Commission has developed a disability employment action plan, designed to lift the representation of people with disabilities within the public sector workforce from four per cent to 12 per cent by 2025.²⁶
- 7.17 Accessibility tools are being embraced in our schools. In 2019, Auslan was one of the most common languages other than English taught in Government primary schools.²⁷ In the same year, the Victorian Government invested \$20.6 million over five years in an early language program for preschool children in Victoria²⁸ which is provided to approximately 6000 children. Auslan is 'the second-most popular language in the program'.²⁹

Laws about equality and inclusion

- 7.18 Key laws relevant to equality and inclusion in Victoria are:
- *Equal Opportunity Act 2010* (Vic) (EOA)
 - *Disability Act 2006* (Vic) relating to disability services
 - *Charter of Human Rights and Responsibilities Act 2006* (Vic) (The Charter)³⁰
- 7.19 At the Commonwealth level, key laws are:
- *National Disability Insurance Scheme Act 2013* (Cth)³¹
 - *Disability Discrimination Act 1992* (Cth)

22 Department of Social Services (Cth), *Australia's Disability Strategy 2021–2031*, (Report, December 2021).
 23 Specifically, it will assist governments to meet their obligations under the following laws and policies: *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); *Disability Discrimination Act 1992* (Cth); *Disability Services Act 1986* (Cth); *National Disability Insurance Scheme Act 2013* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth). See also state and territory legislation, including the Australian Capital Territory and Victorian Charters of Human Rights, and various public service acts.
 24 Council of Australian Governments, *National Disability Strategy 2010–2020* (Report, 2011) 3.
 25 Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022) 14.
 26 'Getting to Work: Disability Employment Action Plan', *Victorian Public Sector Commission* (Web Page, 30 September 2018) <<https://vpssc.vic.gov.au/getting-to-work-disability-employment-action-plan/>>.
 27 Department of Education and Training (Vic), *Languages Provision in Victorian Government Schools, 2019* (Report, 2020) 8.
 28 'Early Childhood Language Program', *Department of Education* (Web Page, 8 April 2022) <<https://www.vic.gov.au/early-childhood-language-program>>.
 29 Madeleine Heffernan, 'Preschools' Love of Language a Good Sign for Auslan', *The Age* (online, 22 November 2021) <<https://www.theage.com.au/national/victoria/preschools-love-of-language-a-good-sign-for-auslan-20211109-p59796.html>>.
 30 Commonwealth laws also protect people's rights in public life and when dealing with Commonwealth Government departments and agencies: see, eg, *Disability Discrimination Act 1992* (Cth); *Fair Work Act 2009* (Cth).
 31 In 2013, the Commonwealth Government introduced the National Disability Insurance Scheme (NDIS) pursuant to the *National Disability Insurance Scheme Act 2013* (Cth). This was rolled out to all states and territories in 2016 and is Australia's first national scheme providing funding directly to people with disability. National Disability Insurance Agency, 'History of the NDIS', *NDIS* (Web Page, 30 July 2021) <<https://www.ndis.gov.au/about-us/history-ndis>>.

- 7.20 State and Commonwealth statutory authorities administer these laws.³² The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is responsible for administering Victoria's discrimination laws and broader human rights laws, including the Charter.³³

The Victorian Equal Opportunity Act

- 7.21 Victoria's EOA 'protects people from discrimination on the basis of their individual attributes in certain areas of public life, and provides redress for people who have been discriminated against'.³⁴
- 7.22 Disability discrimination is unlawful in employment, education, access to premises used by the public, accommodation, the provision of goods and services and disposal of land, accommodation, clubs and associations, sport, and local government.³⁵ Employers and providers of education, goods, services and accommodation have an obligation to make reasonable adjustments for people with a disability, so that they can have equal enjoyment and access to services, accommodation and work.³⁶

Victorian Charter of Human Rights and Responsibilities

- 7.23 The Charter establishes a legislative framework for the protection and promotion of human rights in Victoria. It gives statutory recognition to civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights*.³⁷
- 7.24 The Charter sets out 20 basic rights which promote and protect the values of freedom, respect, equality and dignity.³⁸ Key rights for the purposes of this report include the right to:
- recognition and equality before the law, and protection from discrimination³⁹
 - take part in public life⁴⁰
 - a fair hearing.⁴¹
- 7.25 The Charter adopts a 'dialogue model' of human rights protection in which the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria.⁴² It operates in three main ways:
- Public authorities, including local government and Victoria Police, must act in ways that are compatible with human rights and take relevant human rights into account when making decisions.
 - Human rights must be taken into account when Parliament makes new laws.
 - Courts and tribunals must interpret and apply all laws in a way that is compatible with human rights.⁴³
- 7.26 Charter rights may be limited pursuant to section 7.⁴⁴

32 Victorian Equal Opportunity and Human Rights Commission, *Understand Your Rights* (Web Page) <<https://www.humanrights.vic.gov.au/>>; Australian Human Rights Commission (Web Page, 2021) <<https://humanrights.gov.au/>>; Fair Work Commission (Web Page) <<https://www.fwc.gov.au/>>; 'Welcome to the Fair Work Ombudsman Website', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/>>.

33 *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic); *Equal Opportunity Act 2010* (Vic); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Racial and Religious Tolerance Act 2001* (Vic). The Victorian Disability Worker Commission is another relevant statutory authority. It regulates unregistered disability workers, responds to complaints about disability workers, and has the power to ban unregistered workers from the sector for breaching their code of conduct: see Victorian Disability Worker Commission (VDWC), *Victorian Disability Worker Commissioner* (Web Page) <<https://www.vdwc.vic.gov.au/about/commissioner>>.

34 Department of Justice and Community Safety (Vic), 'Equal Opportunity', *Victoria State Government* (Web Page, 2021) <<https://www.justice.vic.gov.au/equal-opportunity>>.

35 *Equal Opportunity Act 2010* (Vic).

36 Ibid.

37 Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 1.

38 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8–27.

39 Ibid s 8.

40 Ibid s 18.

41 Ibid s 24.

42 Victorian Law Reform Commission, *Guardianship* (Report No 24, 2012) 44 [4.62].

43 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

44 The Charter includes a non-exhaustive list of the relevant factors to consider: *ibid* s 7(2).

Human rights law, the Charter and jury selection

- 7.27 The application of state discrimination and human rights laws to the specific area of jury empanelment is limited and, to some extent, uncertain.

Jury selection falls outside the Equal Opportunity Act

- 7.28 Jury empanelment is not an area of public life in which discrimination is unlawful under the EOA.⁴⁵ The EOA also provides an exemption to compliance if action is necessary to comply with the provision of another Act or an order of the court.⁴⁶

The Charter

- 7.29 The application of the Charter to the jury selection process is not straightforward. It differs depending on who is exercising power—the Juries Commissioner or the courts—and in what capacity that power is exercised (discussed below).

Does the Charter apply to the Juries Commissioner and Juries Victoria?

- 7.30 The Juries Commission is a public authority for the purposes of the Charter.⁴⁷ As such, the Juries Commissioner must give proper consideration to human rights and act compatibly with the Charter.⁴⁸
- 7.31 Section 38 of the Charter enables a public authority to act in a way that is incompatible with a human right or fails to give proper consideration to a human right if it is giving effect to another law and could not have acted differently or made a different decision.⁴⁹ Part 4 of the *Juries Act 2000* (Vic) outlines various roles of the Juries Commissioner. The Juries Commissioner has the statutory authority to determine eligibility for jury duty in accordance with the Act.⁵⁰ Without provisions in the Juries Act to overcome the 13th person rule, potential jurors in the subject groups may lawfully be deemed ineligible to serve.
- 7.32 However, in England and Wales 'reasonable accommodations' to enable jury service have been provided to people in the subject groups for many years. There are protocols in place to accommodate people with disabilities and enable them to serve on juries provided they have not required the assistance of a non-juror in jury deliberations.⁵¹ This has occurred through a coordinated approach by the Jury Central Summoning Bureau (the equivalent of Victoria's Juries Commissioner) and the courts. The *Equal Treatment Bench Book* for judges in the United Kingdom explains that:
- It is not a question of being 'kind and sympathetic' towards a disabled person. That is patronising. The important point is that disabled litigants, defendants and witnesses (and where appropriate, advocates, jurors and others involved in the court process) are able to participate fully in the process of justice. Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards them, but part of showing respect for people's differences and helping to provide a level playing field. The focus should be on actions that remove any unnecessary barriers to participation.⁵²
- 7.33 We discuss the approach in England and Wales, as well as recent reforms to allow a British Sign Language interpreter into the jury room, in Chapter 10.

45 Jury service is not included in Part 4 of the *Equal Opportunity Act 2010* (Vic), which sets out when discrimination is prohibited.

46 Ibid ss 75, 76.

47 See the definition of public authority in *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4. See also *Juries Act 2000* (Vic) s 60.

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).

50 *Juries Act 2000* (Vic) s 21, 25.

51 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

52 Judicial College UK, *Equal Treatment Bench Book* (Manual, February 2021) <<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>>, 97 [8]–[9].

Does the Charter apply to the courts?

- 7.34 The Charter applies to the courts in several ways:⁵³
- when exercising certain functions under the Charter⁵⁴
 - in their capacity as public authorities⁵⁵ but only when acting administratively.⁵⁶
- 7.35 There are some examples in the Charter of when the court is acting in an administrative capacity. These include the issuing of warrants, listing cases and adopting practices and procedures.⁵⁷ Case law has addressed the scope of the application of the Charter to the courts⁵⁸ but neither the Charter nor case law clarifies whether or how the Charter applies to a court at the jury selection stage of a trial.

Jury selection should reflect principles of equality and non-discrimination

- 7.36 The Commission's view is that even if the Charter and the EOA do not specifically apply to the jury selection process, those processes should still comply with the underlying principles of equality and non-discrimination. The recommendations we make are guided by these principles and are directed at removing barriers that prevent participation of people from the subject groups.
- 7.37 Participation in jury service is an important aspect of civic life associated with active citizenship.⁵⁹ Blind Citizens Australia observed:
- People who are blind or vision impaired have the rights and responsibilities to participate to the fullest extent possible in society. This includes fulfilling civic responsibilities such as voting and jury service. A call to jury service is a civic responsibility for all Australian citizens who are not exempt by law.⁶⁰
- 7.38 Not being able to participate in jury service conveys the wrong message about who is considered a full and equal citizen in the eyes of the community and the state.
- 7.39 The courts are called upon to uphold the rights of non-discrimination and equality across the community. The Supreme Court identified that 'the principle of equality before the law and equal access to the Court is foundational to the court's operations'.⁶¹
- 7.40 Jury service should no longer be kept separate from the operation of these fundamental principles. As Vision Australia observed:
- Access to justice—including participation in judicial processes such as jury service—is no longer seen as occupying a separate or privileged place in society that should be sheltered from the impact of evolving expectations.⁶²

53 See generally Judicial College of Victoria, *Charter of Human Rights Bench Book* (Online Manual, 1 September 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/CHRB/BB/index.htm#57496.htm>>.

54 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b). Note, under part 3 the court must consider Charter rights when interpreting legislation and part 2 puts a direct obligation on the courts to act compatibly with Charter rights that affect court proceedings.

55 *Ibid* s 38.

56 *Ibid* s 4(1)(j).

57 *Ibid*.

58 Case law suggests that a court is less likely to be acting administratively if it involves the governance of a trial: *Slaveski v The Queen* [2012] VSCA 48, (2012) 40 VR 1, [107].

59 The Convention Committee notes in the cases of *Lockrey* and *Beasley* that 'the performance of jury duty is an important aspect of civic life within the meaning of article 9(1), as it constitutes a manifestation of active citizenship': Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [8.6] ('*Lockrey v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) [8.6] ('*Beasley v Australia*'). In *JH's* case, Australia rejected *JH's* assertion that 'jury duty is everyone's civic responsibility'. The Committee failed to respond to that comment: Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [2.3], [4.2] ('*JH v Australia*').

60 Position Statement 1 (Blind Citizens Australia).

61 Submission 11 (Supreme Court of Victoria).

62 Submission 10 (Vision Australia).

- 7.41 The Castan Centre for Human Rights Law noted:
- The issue of inclusive juries touches upon the fundamental values of equality, dignity and democratic participation which underpin the Victorian Charter, as well as the international human rights framework which it incorporates into Australian law. Access to justice includes participation as a juror, which is meant to comprise a group of people which reflect our society.⁶³
- 7.42 Regarding the application of the Charter, the Castan Centre commented:
- provisions of the Charter provide powerful support for the Commission to recommend that potential jurors with physical disabilities are supported through reasonable adjustments and accommodations so that they are capable of performing the duties of jury service.⁶⁴
- 7.43 Youth Disability Advocacy Service argued that 'reforming the law to provide for inclusive juries is a human rights issue'.⁶⁵ Associate Professors Bruce Baer Arnold and Wendy Bonython submitted that:
- a more inclusive jury system is a foundation of justice and legitimacy. It is directly consistent with the Victorian Charter of Rights and Responsibilities and, importantly, gives effect to Victoria's commitment to respect the dignity of all people rather than privilege administrative convenience, a privileging that in practice has served to objectify many people as 'citizens minus'.⁶⁶
- 7.44 Although the actual number of people who may serve with reasonable adjustments each year may be low, reform is important. The Commission agrees with VLA that providing reasonable adjustments to people in the subject groups to enable them to serve as jurors will also have broader benefits:
- It will enhance the participation of jurors who are currently not excluded, but nevertheless have challenges in hearing or seeing the evidence in court. It will improve the participation of people with these impairments in other roles, whether as judges, advocates, witnesses, parties or other stakeholders.⁶⁷
- 7.45 In its submission *Juries Victoria* concluded:
- Juries Victoria* supports steps towards making juries more inclusive, a position which goes to our very *raison d'être*. While the extent to which *Juries Victoria* can directly influence the broader work required in such an undertaking is limited by the narrow scope of our empowering legislation, we stand prepared to contribute to the discussion and efforts to bring about such changes.⁶⁸
- 7.46 In view of that positive approach, until the law changes, we encourage the *Juries Commissioner* to explore with people in the subject groups what adjustments will facilitate jury service that do not involve an additional person in the jury room, for example, lip-reading or technological assistance.
- 7.47 More broadly, it is time for the Victorian courts and *Juries Victoria* to work together to provide reasonable adjustments to people in the subject groups. We make recommendations for a coordinated approach to law reform for the courts and *Juries Victoria* in Chapters 11 and 12.

63 Submission 12 (Castan Centre for Human Rights Law, Monash University).

64 Ibid.

65 Submission 3 (Youth Disability Advocacy Service).

66 Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

67 Submission 8 (Victoria Legal Aid).

68 Submission 13 (*Juries Victoria*).

CHAPTER 08

The importance of representative juries

64 Overview

64 Improving representativeness is a key purpose of the Juries Act

65 The advantages of representative juries

67 Community responses: representative juries

68 Sharing the obligation of jury service among the community

8. The importance of representative juries

*Reform will make our society more inclusive. If juries include a wider range of people, then a wider range of views will be offered in the deliberation process. A broader cross-section of people will provide a more accurate reflection of the community.*¹ —Australian Institute of Interpreters and Translators

Overview

- Enabling people from the subject groups to serve on juries will ensure that juries are representative of our community and satisfy a key purpose in the *Juries Act 2000* (Vic).
- Representative juries:
 - assist with impartial decision making by bringing diverse views to the case which may balance out any individual bias; and
 - provide the community with confidence in the justice system by allowing them to participate in the administration of justice.²
- Greater representativeness than is currently the case would spread the obligation of jury duty more broadly across the community.

Improving representativeness is a key purpose of the Juries Act

- 8.1 A key purpose of the *Juries Act 2000* (Vic) (the Act) is to provide for the operation and administration of a jury trial system that 'makes juries more representative of the community'.³ Victoria's Juries Commissioner Paul Dore observes that a jury 'represents the community from which it is drawn, a cross-section of citizens, each with their own experiences and opinions, standards and expectations'.⁴
- 8.2 In our report *Jury Empanelment* (2014), the Commission adopted the Parliamentary Committee's articulation of the representative principle that juries should be:
- an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, gender, occupation and socio-economic status.⁵

1 Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

2 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 32, citing Mark Findlay, 'Juries Reborn' [2007] (90) *Reform* 9, 3, 7, 10.

3 *Juries Act 2000* (Vic) s 1. Mr Loney (Geelong North), who was a member of the Law Reform committee which undertook the juries enquiry, noted in Parliament that: 'Central to our discussions was the issue of exclusions. If we want a representative jury pool we must drastically reduce the number of exclusions. In Victoria under the [Juries] 1967 Act it was about as hard to get into a jury as it was to get into the Australian test team'. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 March 2000, 376 (Peter Loney).

4 Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018) 31.

5 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 9 [2.7], citing Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1996) vol 1 [1.20].

- 8.3 The key means of achieving a representative jury is for jurors to be chosen randomly or impartially 'rather than chosen by the prosecution or the State'.⁶ After random selection from the electoral roll, rules and practices in the jury selection and empanelment process filter out certain people, thereby limiting the representativeness of the jury. For example, the Act excludes particular professions from jury service (see Chapter 2). Peremptory challenges may also impact on representativeness because some groups are more likely to be challenged than others (see Chapter 17).⁷
- 8.4 Rather than direct exclusion through the Act, it is the failure to provide reasonable adjustments and the operation of the 13th person rule that limits the participation of people from the subject groups. It is these indirect exclusions that we address in this report.
- 8.5 Ensuring that juries are also representative of people in the subject groups would benefit juries and the justice system generally.

The advantages of representative juries

Decision-making processes in diverse juries

- 8.6 Good decision making through diversity benefits the justice system and society as a whole. Research in the United States indicates that jury diversity can help strengthen its decision making.⁸
- 8.7 A United States study by Samuel Sommers involving 200 participants on 29 mock juries examined the effect of racial diversity on group decision making. In the study 'participants deliberated on the trial of a Black defendant as members of racially homogeneous or heterogeneous mock juries'.⁹
- 8.8 The study concludes that by 'every deliberation measure examined in the present research, heterogeneous groups outperformed homogeneous groups'.¹⁰ It was found that 'diverse juries deliberated longer, raised more facts about the case, and conducted broader and more wide-ranging deliberations ... They also made fewer factual errors in discussing evidence and when errors did occur, those errors were more likely to be corrected during the discussion'.¹¹
- 8.9 Sommers' research challenges traditional assumptions that the influence of diversity comes from the 'contributions of minority group members' who educate others and bring 'new perspectives and experiences to the table'.¹² Instead, Sommers suggests that the benefits are broader than these assumptions with diversity leading to superior decision making overall. In this case it was 'not that the minority members of the jury were more thorough or accurate than the white jurors, but in diverse juries, *all* members of the group take more care to examine the evidence and reflect critically'.¹³

6 Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) Appendix A, 447.

7 For example, women are more likely to be challenged in criminal trials: Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 42–43; Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 33 [3.92]–[3.96]. Broader societal factors also limit the participation of some groups of people, for example, whether a person is on the electoral roll, if they live regionally or remotely and can get to a court, whether they speak or understand English, and whether they are a recent migrant: see Lord Justice Robin Auld, Ministry of Justice (UK), *Review of the Criminal Courts of England and Wales* (Report, September 2001) ch 5 [6] <<https://ials.sas.ac.uk/eagle-i/review-criminal-courts-england-and-wales-right-honourable-lord-justice-auld-september-2001>>. People may also seek to be excused. The jury eligibility form requests additional information from people seeking to be excused for medical reasons, distance from the court or because they are self-employed, casual workers with unpredictable shifts, work for a small business, have primary caring responsibilities, are a student or an apprentice: Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.

8 Richard Lempert, 'The American Jury System: A Synthetic Overview' (2015) 90(3) *Chicago Kent Law Review* 825, 839, 856.

9 Samuel R Sommers, 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90(4) *Journal of Personality and Social Psychology* 597, 597.

10 Ibid 608.

11 'Racial Diversity Improves Group Decision Making in Unexpected Ways, According to Tufts University Research', *ScienceDaily* (Web Page, April 2006) <<https://www.sciencedaily.com/releases/2006/04/060410162259.htm>>. Sommers also concluded that more diverse juries were 'more open-minded in that they were less resistant to discussions of controversial race-related topics': Samuel R Sommers, 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90(4) *Journal of Personality and Social Psychology* 597, 608.

12 'Racial Diversity Improves Group Decision Making in Unexpected Ways, According to Tufts University Research', *ScienceDaily* (Web Page, April 2006) <<https://www.sciencedaily.com/releases/2006/04/060410162259.htm>>. Samuel R Sommers, 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90(4) *Journal of Personality and Social Psychology* 597, 608.

13 Christina Marinakis, 'What Are the Benefits of Having Diversity in a Jury Panel?', *Litigation Insights* (Blog Post, 30 September 2015) <<https://www.litigationinsights.com/benefits-diversity-jury/>>.

- 8.10 Academics who ran a mock trial involving a deaf juror in New South Wales observed that:
- The feedback suggested that jury deliberations involving an Auslan interpreter were more ordered and in a sense more democratic than usual. People were less likely to speak over each other and interrupt each other. This was also the experience of a deaf juror who was appointed as a foreman juror in New Zealand.¹⁴

Jury participation encourages confidence in the justice system

- 8.11 A 2004 study of the views and attitudes of a sample of jurors who had completed jury service in six English courts found that, for the majority, jury service increased people's confidence in the court system.¹⁵ A similar finding was made in a United States survey by David Rottman, which examined public trust and confidence in California courts.¹⁶ Rottman identified that most (56 per cent) Californians' involvement in a court proceeding came about when they responded to a jury summons or served as a juror. The study found that the 'jury is the prime audience for the state courts, and the best available mechanism for disseminating positive information on the courts by word of mouth. Specific policies and programs should be directed at maximizing this potential'.¹⁷
- 8.12 Similar observations were made in 2011 by the former Victorian Juries Commissioner:
- In a democracy it is essential that every opportunity is provided for the public to participate in the administration of justice. As a consequence of serving as jurors members of the public become part of the court itself. This in turn has served to increase the level of confidence in the courts and the general administration of justice as was recently highlighted in a 2011 Victorian *Juror Feedback Survey*, where 43% of respondents indicated that their level of confidence in the criminal justice system was higher as a result of their participation.¹⁸
- 8.13 The County Court observed:
- Community participation through the jury system is a vital and important part of our justice system and promotes public confidence in the rule of law and the administration of justice.
- The trial process offers the opportunity to educate the community and for those who sit on juries to, in turn, educate others. This opportunity should not be restricted to people without disabilities.¹⁹
- 8.14 The exclusion of people in the subject groups from juries means that they are only experiencing the justice system as victims or litigants, witnesses and defendants or supporters of others. Therefore, Victorian courts are missing the opportunity to build trust and confidence in the justice system amongst the people in the subject groups more broadly.

14 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

15 The research was based on interviews (a combination of qualitative and quantitative methods) with 361 jurors who had recently completed jury service at six Crown Courts in England. Those courts were Southwark, Central Criminal Court (Old Bailey), Wood Green, Blackfriars, Snaresbrook and Norwich. The research took place between October 2001 and October 2002. The interviews were conducted by telephone after jurors completed their jury service: Roger Matthews, Lyn Hancock and Daniel Briggs, *Juror's Perceptions, Understanding and Confidence and Satisfaction in the Jury System: A Study in Six Courts* (Online Report No 05/04, Home Office UK, 2004) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20110218141448/http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolro504.pdf>>, discussed in Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 12.

16 David B Rottman, *Trust and Confidence in the California Courts—A Survey of the Public and Attorneys* (Report Part 1, National Center for State Courts, September 2005). Between November 2004 and February 2005, a survey examining trust and confidence in the Californian courts was conducted. Over 2,400 Californian adults were surveyed regarding their knowledge about the courts and the sources of that knowledge; perceived and experienced barriers to court access; experiences as jurors, litigants, or consumers of court information; expectations for what the courts should be doing; and sense of the accessibility, fairness, and efficiency of the courts. At the same time, over 500 randomly selected practising attorneys were interviewed for their views on topics covered in the public survey and on issues relating to their conduct of business with the state's trial and appellate courts.

17 Ibid 4, Executive Summary, Recommendation 1.

18 Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 29.

19 Submission 14 (County Court of Victoria).

Trial by one's peers

- 8.15 Representativeness is also linked to the notion of a 'trial by one's peers'.²⁰ Disability rights organisations have observed that defendants with disability are denied the opportunity for a trial with a jury that may include their peers.
- 8.16 The exclusion of people from the subject groups means that the 'experience of disability is not available for jury consideration during trials'.²¹ Associate Professors Bruce Baer Arnold and Wendy Bonython note that this exclusion is a 'distortion of the legal process which is not defensible on the basis of cost or administrative inconvenience'.²² Youth Disability Advocacy Service noted in consultation:
- [w]e have heard countless experiences of people with disabilities who have been witnesses, victims or defendants in the Victorian court system. They participate in a trial with a judge, lawyers and jurors who have no understanding of their lived experience. Having jury members who have disabilities would counterbalance this.²³
- 8.17 Victoria Legal Aid (VLA) identified in its submission that approximately one-quarter of VLA clients disclose having a disability or experiencing mental health issues. VLA commented:
- Juries serve an important role in the democratic process; if juries are to be representative of the community, diversity is necessary to ensure that legal decisions reflect the attitudes and values of the whole community. Including people who are deaf, hard of hearing, blind or have low vision to participate in juries (and all components of the legal system) will ensure juries represent the diversity found within the general community, and enable defendants with hearing or vision impairments to have a juror which [sic] shares some of their lived experience. It could also improve access to juror participation for Aboriginal and Torres Strait Islander people, who have a disproportionately high rate of vision and hearing impairments.²⁴
- 8.18 The Commission acknowledges that enabling people from the subject groups to serve on Victorian juries does not necessarily mean that they will indeed serve on a trial involving a party or a witness with a disability. Representativeness as a concept does not extend that far. However, reform is an important step towards normalising the presence of people with disabilities in all aspects of a trial and the court system generally.

Community responses: representative juries

- 8.19 Community responses to the consultation paper supported the benefits and reiterated the importance of representative juries.²⁵ Brent Phillips, a deaf man who in 2014 was not allowed to serve in Victoria with an Auslan interpreter, noted:
- Deaf people come from all walks of life: professionals, managers, lawyers, tradesmen, parents, and contribute to society as much as anyone else ... We should be given the opportunity to serve on juries, particularly if deaf people who are on trial are tried by a panel of non-deaf people.²⁶

20 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 31–32 [3.83]–[3.84]; Civil Society Report Project Group, *Disability Rights Now: Australian Civil Society Shadow Report on CPRD* (Report, August 2012) 81 [223].

21 Civil Society Report Project Group, *Disability Rights Now: Australian Civil Society Shadow Report on CPRD* (Report, August 2012) 81 [223].

22 Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

23 Consultation 17 (Youth Disability Advocacy Service (YDAS)).

24 Submission 8 (Victoria Legal Aid).

25 Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)); Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity); Online Survey (Response 20). Similarly, in 1997 the Victorian Law Reform Committee reported that 'The overwhelming number of submissions were in favour of Victorian juries being representative of the Victorian community': Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997) vol 3 [3.127].

26 Sylvia Varnham O'Regan, 'Deaf Victorian Man Denied from Serving on Jury Calls for "Discriminatory" Law to Be Changed', *SBS News* (online, 24 November 2014) <<https://www.sbs.com.au/news/article/deaf-victorian-man-denied-from-serving-on-jury-calls-for-discriminatory-law-to-be-changed/cvjppqg2>>.

- 8.20 Juries Victoria made several observations about the importance of representative juries:

The representative nature of juries is a central feature of the jury system, ensuring a variety of views, values and life experiences are brought together in the consideration of relevant court matters.

... A jury represents the community from which it is drawn, a cross-section of citizens, each with their own experiences and opinions, standards and expectations. Where a particular segment of the community is excluded from jury service, the jury system's capacity to act as this voice may be reduced.

The Victorian Parliament saw fit to enumerate a number of categories of both compulsory and voluntary exclusion from jury service in the Act. However, only four of these categories result in a permanent exclusion from jury service, thereby seeking to strike a balance between excluding members of the community on reasonable grounds, and having the broadest possible inclusion of the community in the jury process.

This represents an acknowledgement that juries are enhanced by a broad inclusion of the community, an acknowledgment which is reinforced in section 1 of the Act [...] Indeed, if juries are to be truly representative of the community, diversity is essential in ensuring they reflect the views and values of the whole community.²⁷

- 8.21 Both the Supreme Court of Victoria and the County Court of Victoria also emphasised the importance of representativeness.²⁸

Sharing the obligation of jury service among the community

- 8.22 The other key purpose of the Act is to equitably spread the obligation of jury service amongst the community.²⁹ Active citizenship involves shared responsibility. Former Juries Commissioner Rodolfo Monteleone comments:

Jury service is an important but onerous civil responsibility ... Deciding another's fate is a trying ordeal, and the financial and emotional burdens of jury service can be significant even in the most simple cases.³⁰

- 8.23 In its report *A Review of Jury Selection*, the Queensland Law Reform Commission (QLRC) acknowledges that 'jury service is a burden and can disrupt a citizen's life'. No other civic obligation is like jury service in this way.³¹ The QLRC observed that 'a large pool ensures that the burdens and benefits of jury service are shared as widely and fairly as possible, and reflects the fact that jury service is both a duty and a privilege'.³²

- 8.24 When people in the subject groups serve as jurors the responsibility of jury service will be shared more broadly across the community.

²⁷ Submission 13 (Juries Victoria).

²⁸ Submissions 11 (Supreme Court of Victoria), 14 (County Court of Victoria).

²⁹ *Juries Act 2000* (Vic) s 1.

³⁰ Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 25. This paper goes on to explore the need to protect the security and privacy of jurors.

³¹ Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) 68 [5, 26].

³² *Ibid* 67 [5, 23].

CHAPTER 09

Inclusive juries and the right to a fair trial

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9. Inclusive juries and the right to a fair trial

The Court considers that supporting people in the subject groups to serve as jurors, where consistent with the accused's right to a fair trial, would advance the representativeness of juries and the community's confidence in the jury system.¹ —Supreme Court of Victoria

Overview

- Reform must not jeopardise the right to a fair trial. With appropriate safeguards, jury law and practice can be inclusive and uphold the right to a fair trial.
- In some situations, the nature of a particular trial may prevent a person in the subject groups from serving as a juror for fair trial reasons. This should be determined by a judge. In this situation, the person should be returned to the jury pool to potentially serve on another trial. We discuss these reforms in Chapters 11 and 12.
- Reforms aim to address misconceptions about the competency of people in the subject groups to serve as jurors, as well as practical concerns about how change can work in practice.

The right to a fair trial

- 9.1 The right to a fair trial encompasses:
- the 'hearing rule', which is the right to be heard before a competent tribunal, and
 - the 'bias rule', which is the right to have a matter determined by a decision maker who is free from bias and is seen to be unbiased.²
- 9.2 The *International Covenant on Civil and Political Rights* and the *Victorian Charter of Human Rights and Responsibilities* both provide that everyone is entitled to a fair and public hearing before a competent, independent, and impartial tribunal.³

¹ Submission 11 (Supreme Court of Victoria).

² See Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 39 [3.140].

³ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXII), UN Doc A/6316 (16 December 1966, Adopted 23 March 1976) art 14; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

How do jury laws promote a fair trial?

- 9.3 Existing mechanisms at common law and in the *Juries Act 2000* (Vic) (the Act) aim to protect the right to a fair trial. At common law, trial judges have an overriding duty to ensure a fair trial⁴ and inherent powers to stand aside a juror if required.⁵
- 9.4 Trial judges also have general powers under the Act to excuse prospective jurors for good reason,⁶ or to order that they not perform jury service if the court considers it is 'just and reasonable' to do so.⁷ Once a jury has been sworn in, there is a statutory power for the court to discharge a juror without discharging the entire jury, including if a judge thinks that a juror is not impartial or becomes incapable of continuing to act as a juror.⁸
- 9.5 Impartiality in juries is promoted by a range of jury selection and trial processes and practices:⁹
- group decision making
 - randomised jury selection processes
 - the excusal process, which allows jurors who may not be impartial to be excused from a particular trial (for example, where prospective jurors know one of the parties, or may have been involved in an incident similar to the one at trial)¹⁰
 - challenges, including peremptory challenges and challenges for cause and to the array,¹¹ as well as Crown stand asides¹² (see Chapter 17)
 - a juror oath or affirmation to 'faithfully and impartially try the issues' and 'give a true verdict according to the evidence'¹³
 - directions given by the judge to the jury, for example, a direction to only consider evidence presented at trial and to disregard any knowledge they may have.¹⁴ This direction is supported by the prohibition on jurors accessing information about a case or the parties other than through the evidence presented at trial.¹⁵
- 9.6 Similar mechanisms protect the right to be heard before a competent tribunal including:
- juror eligibility criteria¹⁶
 - the ability of the Juries Commissioner to excuse a person from a particular trial for 'good reason' including illness or poor health and incapacity¹⁷ and to permanently excuse a person for reasons including continuing poor health, disability or advanced age¹⁸
 - challenges to the selection of individual jurors.

4 See, eg, *Haddara v The Queen* [2014] VSCA 100, (2014) 43 VR 53, [16]; *James v The Queen* [2014] HCA 6, (2014) 253 CLR 475, [38], cited in Submission 11 (Supreme Court of Victoria).

5 Submission 11 (Supreme Court of Victoria), citing *R v Searle* (1993) 2 VR 367, 374–6, (Marks and McDonald JJ) (Supreme Court of Victoria, Marks, Hampel and McDonald JJ, 24 June 1993); Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014); *R v Bunting* [2003] SASC 257, (2003) 139 A Crim R 562, [13]–[14].

6 *Juries Act 2000* (Vic) s 11. There is also a general power to excuse a person if they are unable to serve for any other reason under s 32(3)(b).

7 *Ibid* s 12.

8 *Ibid* s 43, or if the juror becomes ill or if the judge thinks that for any other reason the juror should not continue to act as a juror. Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 36–37 [3.120]. See also Glossary.

9 *Juries Act 2000* (Vic) s 32. See also Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

10 As explained in our *Jury Empanelment* report, a 'challenge to the array is a common law right to challenge the entire panel. It requires the party to establish that there has been bias on the part of the Juries Commissioner or the pool supervisor or some other default in respect of the constitution of the panel. A challenge for cause requires the party to provide a reason to the trial judge as to why the prospective juror should not be part of the jury. Challenges for cause and to the array are very rare in Victoria'. Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 23 [3.21]–[3.23]. For further discussion about these challenges and relevant case law: see Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [53]–[89] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

12 This report only considers peremptory challenges and Crown stand asides.

13 *Juries Act 2000* (Vic) sch 3.

14 Judicial College of Victoria, '1.5 Decide Solely on the Evidence', *Victorian Criminal Charge Book* (Online Manual, 14 May 2021) [1] <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>, citing *R v Glennon* (1992) 173 CLR 592, (High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 6 May 1992); *Murphy v The Queen* (1989) 167 CLR 94, (High Court of Australia, Mason CJ, Brennan, Deane, Dawson and Toohey JJ, 30 May 1989); *R v VPH* (New South Wales Court of Criminal Appeal, Gleeson CJ, Newman and Sully JJ, 4 March 1994); *R v Vjestica* [2008] VSCA 47, (2008) 182 A Crim R 350.

15 *Juries Act 2000* (Vic) s 78A; Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 37 [3.120].

16 *Juries Act 2000* (Vic) sch 2.

17 *Ibid* s 8.

18 *Ibid* s 9.

The right to a fair trial is a paramount consideration

- 9.7 While supporting reform, many people told us that change must not prejudice the right to a fair trial. The Commission agrees. Many in the legal community emphasised that the right to a fair trial is a paramount consideration.¹⁹ County Court consultees emphasised that 'the principle of a fair trial must prevail'.²⁰ Similarly, the Supreme Court noted that trial judges have 'an overriding duty to ensure a fair trial'.²¹ Victoria Legal Aid (VLA) noted that:

While VLA supports facilitating increased access to jury participation, inclusivity measures must also ensure an accused person's right to a fair trial.²²

Concerns about competency and the impact of inclusive juries on fair trials

*There needs to be a change in approach—a move from a focus on what people can hear to what people can actually do. It is possible to understand concepts, regardless of hearing levels. There are many ways to know and comprehend something; hearing is just one of them.*²³—Participant in the Deaf Victoria consultation

- 9.8 The key fair trial concern for inclusive juries is about competency of people in the subject groups to serve as jurors. In our consultation paper we noted that two concerns can arise in relation to competency. These can be considered as *general concerns* and *specific concerns*:

General concerns—Some people believe that jurors who are deaf, hard of hearing, blind or have low vision are not competent to serve as a juror on any trial because of their disability.²⁴

Legal professionals have raised concerns about the accuracy and equivalency of Auslan-interpreted evidence²⁵ and the training and qualifications of Auslan interpreters.²⁶ Other concerns have been raised about having a 13th person in the jury room.²⁷

Specific concerns—There is concern that, depending on the nature of a particular trial, a person in the subject groups may not be able to evaluate certain types of evidence critical in that trial, even with reasonable adjustments.²⁸

- 9.9 In many circumstances a person who is deaf, hard of hearing, blind or has low vision can perform the role of a juror when reasonable adjustments are provided. As the the Office of Public Prosecutions (OPP) told us, 'Just because you have vision or hearing loss doesn't mean that you don't have the ability to understand the concepts presented to you'.²⁹

19 Submissions 7 (Law Institute of Victoria), 8 (Victoria Legal Aid), 11 (Supreme Court of Victoria), 14 (County Court of Victoria); Consultations 4 (Victorian Criminal Bar Association) 16 (Office of Public Prosecutions Victoria), 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

20 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

21 Submission 11 (Supreme Court of Victoria).

22 Submission 8 (Victoria Legal Aid).

23 Consultation 6 (Deaf Victoria and community participants).

24 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 341–342; Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 26.

25 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 332, 341–343.

26 Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 26.

27 Ibid.

28 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 343–345.

29 Consultation 16 (Office of Public Prosecutions Victoria).

- 9.10 In Chapter 10 we discuss practice in overseas jurisdictions, where the courts have facilitated jury service for people with 'reasonable adjustments' for decades, while upholding and maintaining the right to a fair trial.

Deaf jurors and Auslan interpreters

- 9.11 Concerns about the competency of a deaf person to serve as a juror are often tied to concerns about the role of an Auslan interpreter. Following the mock trial involving deaf jurors (discussed below) Hale and colleagues identified concerns amongst legal professionals about 'the cognitive and language skills of prospective deaf jurors, the logistics in engaging and arranging interpreters in court, and quality or standard of interpreters'.³⁰ Researchers also identified concerns about having Auslan interpreters in jury rooms and 'accuracy and equivalency' concerns 'about the substantive content of interpreted evidence'.³¹
- 9.12 Practical concerns about Auslan interpreting are evident in Australia's response to the CRPD decisions (discussed in Chapter 6). For example, Australia expressed concern about the use of multiple interpreters to work with a juror and the need to rotate them every 15-40 mins, which it argued may 'impact the continuity' of deliberations.³²
- 9.13 In consultation, Alastair McEwin pointed to misconceptions about the role and accuracy of Auslan interpreters. He noted that this 'plays on lawyers' minds. They think: "What if the interpreter gets things wrong or misinterprets me?" They make assumptions about the ability of an Auslan interpreter to be effective'.³³
- 9.14 In Chapter 14 we discuss how Auslan interpreting is a highly skilled profession and interpreters are bound by a code of ethics³⁴ and must undertake regular professional development training to maintain their certification.³⁵ Spencer and colleagues identified among legal professionals 'widespread ignorance of the requirements of NAATI accreditation and the Code of Ethics imposed on members of the Australian Sign Language Interpreters' Association (ASLIA), which ensure professional accountability and confidence in the accuracy of translation by members'.³⁶
- 9.15 The same issues were raised in our consultations. Della Goswell from the Department of Linguistics at Macquarie University told the Commission that:
- what interpreters do and how to interact with them (i.e. spoken language interpreters, let alone Auslan) is still not well understood.³⁷

30 See generally Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 19.

31 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 341.

32 Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) [12]; Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia) and 13/2013 (ML v Australia)* (Human Rights Communication, 24 October 2016) [10].

33 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

34 Australian Institute of Interpreters and Translators (AUSIT), *Code of Ethics* (November 2012); Australian Sign Language Interpreters' Association (ASLIA), *Code of Ethics and Guidelines for Professional Conduct* (2007).

35 Consultations 13 (National Accreditation Authority for Translators and Interpreters (NAATI)), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)).

36 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 342. These observations were based on post-mock-trial interviews with those involved, as well as a large focus group 'with members of the NSW Supreme Court bench, senior barristers and solicitors and Department of Justice representatives'.

37 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

- 9.16 The Australian Institute of Sign Language Interpreters suggested that 'the legal profession is the most difficult to work for'.³⁸ In 2017, the Judicial Council on Cultural Diversity published *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (RNS) which extend to Auslan interpreters.³⁹ The RNS promote a better working relationship between courts, judges, the legal profession and the interpreting profession. While the RNS are not mandated and are therefore not required to be followed in the courts, they provide valuable guidance and examples of best practice. A second edition was published in 2022.⁴⁰
- 9.17 There are concerns that best practice may not be occurring because the RNS may not be well known among lawyers and judicial officers.⁴¹ A University of New South Wales study is currently considering the uptake of the RNS across Australian courts and tribunals, the possible impact of non-adherence to RNS on interpreted proceedings and ways to improve uptake.⁴²
- 9.18 Spencer and colleagues identify three further substantive concerns from legal professionals regarding Auslan interpreting:
- 1) Whether Auslan can convey the non-verbal elements of oral evidence
The researchers did not think that this concern was sufficient to prevent the participation of deaf jurors. Sign language interpreters have a wide variety of ways to convey non-verbal communication. Maintaining sight lines between deaf jurors, witnesses, advocates and interpreters is crucial.⁴³
 - 2) Juror reliance on secondary interpretation evidence rather than primary evidence and concerns that jurors would not all be experiencing the 'same evidence'
We discuss this further below.
 - 3) The option to exercise peremptory challenges over the inclusion of deaf people on juries⁴⁴
This may occur because of concerns about deaf jurors receiving secondary evidence or concerns that 'more things can go wrong' with a deaf juror on a trial.⁴⁵
We discuss challenges to juror selection in Chapter 17.

Concerns about juror reliance on secondary interpretation evidence

- 9.19 VLA and the Supreme Court raised a fair trial issue about the way in which evidence is relayed via an interpreter. Although supportive of reforms to limit the 13th person rule, VLA relayed concerns from practitioners about the way in which a juror using adjustments receives evidence:
- The effect of enabling interpreters to assist jurors is that the juror is receiving the evidence via another person rather than directly from the witness or via comment from counsel or the judge; the translation may be an interpreted or filtered version of the evidence. Because jury deliberations are confidential, there is no way of knowing whether the evidence has been correctly interpreted or whether slightly different nuances have been consciously or unconsciously added to the interpretation. ... We

38 Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)). For further information about the concerns of lawyers working in a court or tribunal setting: see Erika Gonzalez, *Survey on the Implementation of the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, November 2020).

39 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, 2017).

40 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022).

41 For example, a 2020 study by Australian Institute of Interpreters and Translators noted that nearly 35% of survey participants were not aware of the RNS. Further, 10.62% of survey respondents stated that the RNS are never applied, 76.77% mentioned that they are applied sometimes, and 12.61% mentioned that they are applied always; Erika Gonzalez, *Survey on the Implementation of the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, November 2020) 5–6.

42 Professor Ludmila Stern et al, *Access to Justice in Interpreted Proceedings: The Role of Judicial Officers* (Australia Research Council Linkage Project, University of New South Wales) <<https://research.unsw.edu.au/projects/access-justice-interpreted-proceedings-role-judicial-officers>>; Information provided by Professor Ludmila Stern to Victorian Law Reform Commission (30 November 2021).

43 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 341–2.

44 Ibid 344–5.

45 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 20.

support better research on these potential risks in the course of the implementation of this reform.⁴⁶

- 9.20 Spencer and colleagues identified that concerns such as these revealed 'anxieties about the need for judicial oversight of interpreting and attentiveness to risks that may raise implications in terms of the court's obligation to ensure that the defendant receives a fair trial'.⁴⁷ We discuss fair trial safeguards including judicial oversight later in this chapter.
- 9.21 In response to the United Nations case of *JH v Australia*, Australia commented:
- all interpretation from one language to another involves some degree of subjective interpretation. In particular, there may be interpretative ambiguities in conveying shade, mannerisms, nuance and tone through an Auslan interpreter. A deaf juror will not be able to make their own direct assessment of such evidence, but would instead need to rely on the interpretation of the translator.⁴⁸
- 9.22 The Supreme Court observed that 'the "same evidence" argument is likely to be raised by counsel if the Court is required to determine whether a person who requires the assistance of an Auslan interpreter or describer is able to serve as a juror'.⁴⁹ It suggested that this issue may benefit from legislative clarification. The Court identified that it was not necessary for the High Court to address the argument in the *Lyons* case because there was no statutory provision enabling a 13th person in the jury room.⁵⁰
- 9.23 This argument can only be raised in relation to evidence presented in court when the jury is hearing or seeing evidence (interpreted or not). It does not apply to jury room deliberations. The fact that the interpretation that happens in the jury room cannot be verified is an issue which cannot be addressed under the current rules of jury confidentiality. There has never been any procedure for recording, assessing, or checking the actual substance of jury deliberations.
- 9.24 If concerns arise regarding the interpretation or provision of evidence to a juror from the subject groups, a juror can raise these concerns with a judge during the course of the trial. Section 78 of the Act contains a comprehensive process for the investigation of alleged irregularities. This section is designed to maintain the confidentiality of deliberations (other than for legitimate investigative purposes), and to maintain juror anonymity. The Court of Appeal can commence those procedures where a jury irregularity is alleged on an appeal.
- 9.25 Where reasonable adjustments are provided, the judge should direct in appropriate circumstances that the transcript record the use of those adjustments, for example for the purposes of a subsequent appeal. The record could indicate that the evidence was presented to the jury in different formats. For example, noting the use of an Auslan interpreter, a support person, a disability aid with speech-to-text programs and screen reading programs. In some circumstances it may be unnecessary to make this direction, for example, if the reasonable adjustment was the use of an assistance animal.

⁴⁶ Submission 8 (Victoria Legal Aid).

⁴⁷ David Spencer et al, 'Justice is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 342.

⁴⁸ Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 35/2016 (JH v Australia)* (Human Rights Communication, 11 February 2020) [12]. Similar comments were made in response to Beasley and Lockrey's cases: Australian Government, *Response of Australia to the Committee on the Rights of Persons with Disabilities in Communication No 11/2013 (GB v Australia)* and 13/2013 (*ML v Australia*) (Human Rights Communication, 24 October 2016) [13].

⁴⁹ Submission 11 (Supreme Court of Victoria).

⁵⁰ *Ibid.*

Research conclusions about jury service with Auslan interpreters

- 9.26 Academic research has examined the feasibility of deaf jurors serving with sign language interpreters in Australia and the impact on jury deliberations.⁵¹
- 9.27 Researchers have concluded that 'deaf people can comprehend legal discourse in a courtroom setting' and that deaf people can participate in jury duty via an Auslan interpreter. There is 'no measurable detriment in having a deaf person and an interpreter as part of court proceedings and in the jury deliberation room'.⁵²
- 9.28 Research examined how well Auslan translated legal concepts and compared the level of comprehension of deaf and hearing jurors. Key findings included:
- There was 87.5 per cent accuracy in the translation from English into Auslan.
 - Legal concepts are translatable from English into Auslan, but interpreters need to be adequately skilled so as not to skew the legal definitions or to bias the text with subtle shifts in interpretation.
 - Both deaf and hearing jurors misunderstood some concepts and there was not a big difference between the number of correct responses from deaf and hearing participants (2.8 per cent). Any statistical differences were likely influenced by educational background.⁵³

Australian mock trial

- 9.29 In 2014, a mock trial involving deaf jurors was undertaken in New South Wales to gauge what happens in deliberation and the impact on a trial.⁵⁴ The mock trial was based on a real case. Case documents were the same as those in the original trial. It involved two deaf jurors, Auslan interpreters, lawyers, barristers and a retired judge. Actors played the part of the defendant and a witness. The mock trial lasted for a day and a half, followed by half a day of jury deliberation involving one deaf juror.⁵⁵
- 9.30 The study concluded that a deaf person could serve effectively as a juror when trained professional Auslan interpreters are engaged.⁵⁶ The deaf juror was an active participant in the deliberation process,⁵⁷ the involvement of the interpreter did not undermine or destabilise jury deliberation, and any distractions were only temporary.⁵⁸ The judge reported that the mock trial was not very different to other trials he had been involved in. The judge was of the view that training should be provided on how to run proceedings that involve Auslan interpreters to judges and court staff.⁵⁹
- 9.31 To ascertain perceptions about the impact of having a deaf person as a juror, researchers have also made observations in United States courtrooms and surveyed interpreters and legal professionals about the role of the deaf juror in trials across common law countries.⁶⁰

51 For more extensive discussion of this research: see Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) ch 6. We consulted with the following academics for this report: Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

52 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 345.

53 The key findings are summarised in Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23. Key studies cited include: Jemina Napier and David Spencer, *Guilty or Not Guilty? An Investigation of Deaf Jurors' Access to Court Proceedings via Sign Language Interpreters* (New South Wales Law Reform Commission Research Report No 14, 2007); Jemina Napier and David Spencer, 'Jury Instructions: Comparing Hearing and Deaf Jurors' Comprehension via Direct or Mediated Communication' (2017) 24(1) *International Journal of Speech Language and the Law* 1.

54 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016).

55 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

56 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 20.

57 Ibid 12.

58 Ibid 15.

59 Ibid.

60 179 sign language interpreters and 97 legal professionals from Australia, Canada, the United States, United Kingdom, Ireland, South Africa and New Zealand responded to an online survey: see Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 26.

- 9.32 The results suggested that the perceptions of legal professionals depended upon whether and to what extent they had experience working with interpreters. The results were 'overwhelmingly more positive' in the United States, where use of interpreters has been permitted for over 30 years in various states, as opposed to countries where this occurs less frequently or never.⁶¹ The researchers concluded that the 'majority of legal professionals and interpreters agree that deaf people should not be excluded from jury service and that the administration of justice is a shared responsibility'.⁶² Respondents 'acknowledged that it can be challenging, but no more challenging than court interpreting generally, and that the biggest hurdle was the logistics of organising teams of interpreters to be on stand-by in case a deaf person is empanelled'.⁶³

Jurors who are blind or have low vision

- 9.33 Vision Australia noted that 'The community is often unaware of the advanced technology that is available to help blind people to read documents'. Some people also believe that blind people:
- are unable to function in a dynamic environment such as a courtroom or a deliberation room. This is based on unfounded assumptions from a lack of contact with blind people. Blind people are often not seen in court environments. This is one reason why there is a need for reform: so that people can see blind people in these environments.⁶⁴
- 9.34 Blind jurors can hear oral testimony, discussion, trial instructions and deliberations. As the New South Wales Law Reform Commission (NSWLRC) observes, in the context of blind jurors:
- the mere fact that there is evidence in the form of documents, diagrams, photographs and so on need not result in automatic exclusion of a blind juror, as in many cases there will be no issue as to its interpretation, and the content can be conveyed successfully through description or using technology. In the Commission's view, reasonable adjustments provide scope for facilitating the inclusion of a person who is blind or has low vision on the jury panel.⁶⁵
- 9.35 In the United States, courts have held that people who are blind are presumptively capable of assessing physical evidence with appropriate supports, such as a trained describer.⁶⁶ In *Commonwealth v Heywood* the Supreme Court of Massachusetts considered whether an error in law had been made to allow a blind person to serve on the jury.⁶⁷ It was held that the blind juror could assess evidence critical to the verdict and therefore perform their role. In this case the juror could determine if the victim had suffered serious bodily injury from testimony and an evaluation of medical records:
- As the injuries suffered by the victim were not visible at the time of trial, the ability to see the victim's face during his testimony was not essential to reaching a verdict. Similarly, because of the internal nature of the injuries and subsequent surgery, photographs of the victim's face taken close in time to the assault would not have assisted.⁶⁸

61 Ibid.

62 Ibid 27.

63 Ibid 27.

64 Consultation 7 (Vision Australia).

65 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 50 [3.8].

66 *People v Caldwell*, 603 NYS 2d 713, 714 (1993); *People v Hayes*, 923 P 2d 221, 226–7 (Colo App, 1995). *People v Hayes* was a case about a blind judge who did not disqualify himself from considering a case that involved video evidence, but had it described to him. The person appealed their conviction, but the Court of Appeals found that the judge was right not to disqualify himself.

67 *Commonwealth v Heywood*, 484 Mass 43 (2020).

68 Ibid 1024.

Assessing the demeanour of witnesses

- 9.36 The NSWLRC identified that the 'main issue' to be considered regarding the competency of jurors who are blind or have low vision is their inability to observe visual evidence or the demeanour of witnesses and therefore determine credibility.⁶⁹ Similar concerns might also be expressed in relation to deaf jurors who will be unable to hear a witness's voice to assess demeanour.
- 9.37 The way a person gives evidence, especially under cross-examination, is one factor in determining credibility. Case law indicates that relevant factors include demeanour, tone of voice, manner of speech, spontaneity in answering the question and 'whether the plaintiff answered questions in a manner designed to satisfy the questioner or to give honest and truthful answers'.⁷⁰
- 9.38 People in the subject groups have not served on juries in Victoria. The appeal courts have therefore not had to consider a scenario where a juror might not have been able to see or hear a witness and relied on other means to assess their credibility.

The decreasing importance of demeanour evidence

- 9.39 In the consultation paper we noted that the significance of demeanour has reduced in favour of more objective evidence.⁷¹ Judges will often make a general direction to the jury that reliance on demeanour evidence must be 'kept in balance with other considerations'.⁷² Research suggests that judges and lay people are routinely inaccurate when assessing the credibility of witnesses based on their demeanour. For example, studies indicate that conventional wisdom about the behaviour of liars, including that 'liars look away, fidget, speak in a higher pitch or are more likely to be nervous', is unfounded in evidence.⁷³ Other studies have shown that a person's ability to discern when someone is lying 'functions only slightly better than random chance'.⁷⁴
- 9.40 The Judicial College of Victoria's *Serious Injury Manual* emphasises:
- Due to the unreliability of assessments based on demeanour, courts will generally focus on the objectively established evidence and compare that to the witness' accounts. Inconsistencies between the objectively established evidence and a witness' account will then reflect on the witness' credibility ...⁷⁵

Using different senses to assess credibility

- 9.41 While people who are blind may not have access to visual cues, they can still assess credibility on the basis of other senses.⁷⁶ The Law Institute of Victoria (LIV) noted that 'there is broad acceptance that a person with vision loss would have other heightened senses'.⁷⁷ Similar observations were made by the Victorian Criminal Bar Association consultees.⁷⁸

69 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 50 [3.7].

70 Judicial College of Victoria, '5 Assessing Credit', *Serious Injury Manual* (Online Manual, 2015) [15] <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing *Woolworths Ltd v Warfe* [2013] VSCA 22, [114]; *Markes v Futuris Automotive Interiors* [2014] VCC 1420.

71 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 48–51 [6.14]–[6.29], citing *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118, [31]. See also New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 51; *CSR Ltd v Della Maddalena* [2006] HCA 1, (2006) 224 ALR 1.

72 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 53 [3.15].

73 Judicial College of Victoria, '5 Assessing Credit', *Serious Injury Manual* (Online Manual, 2015) [18] <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (John Wiley and Sons, 2008); Paul Ekman and Maureen O'Sullivan, 'Who Can Catch a Liar?' (1991) 46(9) *American Psychologist* 913, 913–920; Michael Green, 'Credibility Contests: The Elephant in the Room' (2014) 18(1) *International Journal of Evidence and Proof* 28, 28–40.

74 Judicial College of Victoria, '5 Assessing Credit', *Serious Injury Manual* (Online Manual, 2015) [19] <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing Steven I Friedland, 'On Common Sense and the Evaluation of Witness Credibility' (1989) 40(1) *Case Western Reserve Law Review* 63; Charles F Bond Jr and Bella M DePaulo, 'Accuracy of Deception Judgments' (2006) 10(3) *Personality and Social Psychology Review* 214.

75 Judicial College of Victoria, '5 Assessing Credit', *Serious Injury Manual* (Online Manual, 2015) [24] <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>.

76 Consultation 1 (Blind Citizens Australia).

77 Consultation 2 (Law Institute of Victoria).

78 Consultation 4 (Victorian Criminal Bar Association).

- 9.42 The National Federation of the Blind, United States, cites studies finding that people who are blind are able to assess credibility evidence by focusing on verbal elements:

In evaluating testimony, blind jurors can concentrate on verbal testimony while avoiding distractions like a witness's facial expressions, dress, appearance, and body movements. Even visual cues indicating deception, like nervous tics, darting glances and uneasy shifting, are nearly always accompanied by a corresponding audible cue such as throat-clearing, swallowing, voice quavering, or inaudibility.

As one blind juror described, 'I've found that I've been pretty accurate—probably as, if not more accurate, than people who make eye contact, because people have gotten real good about fooling people on the visual level, but people often don't think about how they sound when they speak.' Another blind juror, who served on a murder trial, observed that 'People can control face muscles ... Nobody thinks about the nuances of the human voice'.⁷⁹

- 9.43 Deaf Victoria consultation participants referred to the range of tools that deaf people use to make decisions:

Many people might be surprised about how many jury members rely on non-verbal cues—eg blushing, sweating, shaking of hands etc. There are so many ways to understand and analyse a situation. Deaf people rely on these other cues even more. They are skilled at understanding facial expression and body language in a way that one could argue is superior to those who do not rely so heavily on visual cues.⁸⁰

Assessment of demeanour should not be a barrier to jury service

- 9.44 The County Court noted that while the assessment of witness demeanour is important:

judges provide a direction to jurors to the effect that witnesses behave and come across in different ways for a variety of reasons not everyone will comprehend—they come from all walks of life and there are too many variables to accurately assess the demeanour of a witness in the witness box. The Court does not see the assessment of demeanour as a potential barrier to participation.⁸¹

- 9.45 Similarly, the OPP did not think that the ability to assess certain types of demeanour evidence should be a precluding factor.⁸² Victorian Criminal Bar Association consultees observed: 'We have low expectations of people with disabilities. We need to expect that people with disabilities will bring their everyday skills to the task'.⁸³

- 9.46 On this issue, the NSWLRC concluded that:

The argument that an inability to observe demeanour should disqualify a blind or deaf person from jury service contains at least three assumptions; first, that demeanour always conveys information that aids in the interpretation of what has been consciously communicated; secondly, that the witness to another's demeanour can interpret it accurately; and thirdly, that blind and deaf jurors are deprived of the opportunity of detecting demeanour ...

While it can be important, the value of observable demeanour evidence, according to a substantial body of research, appears to have been overstated and, as such, accorded too much value as a tool for judging credibility ... Consequently, it is an inappropriate determinant in the issue of eligibility for jury service.⁸⁴

- 9.47 It is the Commission's view that all jurors use different processes to make decisions in a jury trial. In any given trial some jurors may rely heavily on demeanour evidence but others may put more weight on factual evidence. In this context, the inclusion of jurors from the subject groups is unremarkable. The unanimous verdict of a jury is about their collective conclusion. It is irrelevant how each of the jurors arrived at that verdict.

79 National Federation of the Blind, National Federation of the Blind of Massachusetts, and Disability Law Centre, 'The Right of Blind People to Serve on Juries Comes to the Court' (2019) 62(9) *Braille Monitor* <<https://nfb.org/resources/publications-and-media/braille-monitor>>, citing D Nolan Kaiser, 'Juries, Blindness, and the Juror Function' (1984) 60(2) *Chicago Kent Law Review* 19, 200; Matthew J Crehan, 'Seating the Blind Juror' (1997) 81(3) *Judicature* 104, 106.

80 Consultation 6 (Deaf Victoria and community participants).

81 Submission 14 (County Court of Victoria).

82 Consultation 16 (Office of Public Prosecutions Victoria).

83 Consultation 4 (Victorian Criminal Bar Association).

84 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 53 [3.14]–[3.15].

Addressing misconceptions about competency

9.48 In response to our consultation paper, several community members noted how frustrating it is when people make unfair assumptions about their abilities rather than asking them. For example, a Blind Citizens Australia consultee told us: 'We need to be assessed if we can do a task—not just subjected to people's views on what we can and cannot do'.⁸⁵

9.49 As Alastair McEwin succinctly summarised:

Deaf people confront comments and barriers to access every day, such as: 'it's too hard', 'it's too expensive', 'it's never been done before'.⁸⁶

9.50 Consultation participants from Deaf Victoria commented that:

We are constantly having to educate the wider community about our abilities. It is disappointing to have to do this in the legal sector which should be representative and inclusive of the broader community.

People tell us constantly: 'You can't do this; you can't possibly do that.' But we are not offered the opportunity to try because of the current barriers to participation. We could bring a different perspective. No one asks us what we can do.⁸⁷

9.51 Almost all of the people we spoke to or heard from who were deaf, hard of hearing, blind or have low vision commented that they are routinely underestimated.⁸⁸ They told us that this happens because of misconceptions in the community about the ability of people with sensory disabilities to comprehend information.⁸⁹ Alastair McEwin told the Commission, 'Just because a person can't hear sound, doesn't mean there is a lack of comprehension'.⁹⁰

9.52 The Commission was told that people in the subject groups are limited by the imaginations of those who do not have a sensory disability. A Blind Citizens Australia consultation participant told the Commission:

Some people try to imagine how they would do a task without sight and cannot, so they can't imagine how we could do it. We are limited by their imaginations, rather than being asked how we can do things.⁹¹

9.53 Another consultee told us about his personal experience:

I was standing around with the other blokes at the bowls club, and everyone was asked if they would like to be on the committee except me. I asked, 'Why didn't you ask me?'. They said, 'Oh we didn't think you could do it.' Since then, I've been a committee member, a senior member, and the President!⁹²

9.54 We were told that young people within the subject groups are particularly concerned about being ignored and disempowered. Youth Disability Advocacy Service (YDAS) observed:

young people with disabilities face difficulties accessing information. They are often the subject of 'gatekeeping'. Organisations and service providers target the parent/carer/guardian when providing information rather than the young person. Essentially, young adults with disabilities are underestimated to the point that they are not able to be autonomous.⁹³

85 Consultation 1 (Blind Citizens Australia).

86 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

87 Consultation 6 (Deaf Victoria and community participants).

88 Consultations 1 (Blind Citizens Australia), 6 (Deaf Victoria and community participants), 7 (Vision Australia), 8 (Brent Phillips), 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

89 For example, Consultations 6 (Deaf Victoria and community participants), 7 (Vision Australia), 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

90 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity). Similarly, a member of Deaf Victoria noted that: 'There is an underlying attitude that deafness equates to "can't". However, the ability to hear is different from the ability to understand and comprehend'. Consultation 6 (Deaf Victoria and community participants).

91 Consultation 1 (Blind Citizens Australia).

92 Ibid.

93 Consultation 17 (Youth Disability Advocacy Service (YDAS)).

- 9.55 Numerous community members noted the negative impact that these assumptions and low expectations have on their lives. One consultation participant noted: 'Many of us can have children and raise them in a flourishing environment. Misconceptions can negatively impact our lives and those of our children.'⁹⁴

Why do misconceptions arise?

- 9.56 Alastair McEwin suggested that misconceptions about the abilities of deaf people arise for a range of reasons including the social isolation of deaf people from hearing people. He observed that 'the vast majority of hearing people don't have much, if any, contact with deaf people'.⁹⁵
- 9.57 Consultees from the Victorian Criminal Bar Association told us that there 'is a general lack of understanding of the capabilities of deaf/blind jurors and the work and function of Auslan interpreters'.⁹⁶ We have also been told that there are very few lawyers or judges with disability.
- 9.58 A deaf participant in the consultation with YDAS referred to a personal experience of being a witness in court. The participant noted that 'I could see that the jury did not understand my lived experience' and that the jury did not seem to understand anything about Auslan.⁹⁷
- 9.59 The Australian Law Reform Commission has found that 'negative attitudes and a lack of awareness about disability was a significant barrier to people with disability accessing justice'.⁹⁸ The South Australian Law Reform Institute recently noted that barriers to effective participation in legal proceedings for people with complex communication needs (including people with hearing impairments)⁹⁹ include:
- knowledge and skills barriers (ie, legal professionals lack knowledge and training about how to work with people with disabilities, police prioritisation of crimes and lack of skill in taking statements from people with disability) and attitude barriers (ie, myths about people with disability ...).¹⁰⁰
- 9.60 Della Goswell noted:
- The legal profession would benefit from exposure to other deaf people and the broader deaf community—to have a more realistic sense of their experiences and abilities. Deaf jurors could add to this positive exposure.¹⁰¹
- 9.61 Consultees from the County Court told the Commission that in their view 'there is no general prejudice or bias against people with disability in the Court. There may of course be unconscious bias. Concern is more likely to arise in relation to the added burden on the trial judge' and the 'more that reforms can front load the assessment and provision of supports the more likely reform will be supported in practice'.¹⁰²

94 Consultation 6 (Deaf Victoria and community participants).

95 Consultations 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

96 Consultation 4 (Victorian Criminal Bar Association).

97 Consultation 17 (Youth Disability Advocacy Service (YDAS)).

98 Australian Human Rights Commission, Submission to United Nations Committee on the Rights of Persons with Disabilities, *Information Concerning Australia's Compliance with the Convention on the Rights of Persons with Disabilities* (25 July 2019) [61], citing Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (Report, February 2014) 12.

99 South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, 2021) [2.3.50]–[2.3.56].

100 Ibid [2.3.2].

101 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

102 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

- 9.62 Researchers who ran the mock trial in New South Wales involving a deaf juror observed that:

One of the comments from the judge in the mock trial was that a criminal trial is a delicate thing, and you're managing a number of things at once. Once you press the go button you can't stop. So, he was anxious about adding another difficult thing to the mix.

While that is not a reason to not amend the law to allow deaf jurors to serve, you do need to engage with those anxieties. It is an issue of changing hearts and minds.¹⁰³

- 9.63 Training about the operation of new laws and the role of adjustments will assist to allay concerns in the legal profession about reform. Disability awareness training for the profession to address conscious and unconscious bias, with a practical focus and involving people with disabilities, will also be very important. We discuss these reforms in Chapters 14, 15 and 18.

When might jury service not be possible?

- 9.64 All jurors, including those from the subject groups, must be able to:

- perceive evidence
- comprehend evidence
- follow court proceedings
- deliberate effectively with their fellow jurors.

- 9.65 There may be situations where a potential juror is unable to perform their role because of the nature of evidence in a particular trial and their inability to adequately comprehend it, even with adjustments. For example, a case might turn upon identifying a voice in a phone call or identifying a person from a photograph or CCTV. A person who cannot hear or see the evidence may not be able to adequately perform the role of juror in that particular case.

Community responses: when jury service is not possible

- 9.66 Most responses to the Commission agreed that, in some situations, the combination of a particular disability and the nature of evidence that is material to the outcome of a trial may mean that a person from the subject groups is unable to perform their role as juror, even with reasonable adjustments.¹⁰⁴ Responses were mixed about how often this issue might arise.
- 9.67 The OPP identified that it will be important for a trial judge to be able to exclude a person where, 'notwithstanding supports, that person could not perform their duty in the circumstances of the trial'. It suggested that, in those circumstances, the potential juror should return to the jury pool.¹⁰⁵

CCTV and voice identification evidence

- 9.68 The legal community raised concerns about trials where it was critical to establish identity through voice or CCTV footage.¹⁰⁶ The County Court noted that 'Matters involving visual or voice identification cannot always be anticipated—they sometimes arise part way through a trial'.¹⁰⁷

¹⁰³ Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

¹⁰⁴ For example, Submission 7 (Law Institute of Victoria); Consultation 5 (Expression Australia).

¹⁰⁵ Consultation 16 (Office of Public Prosecutions Victoria).

¹⁰⁶ Ibid.

¹⁰⁷ Submission 14 (County Court of Victoria).

- 9.69 Brent Phillips agreed that there may be some situations where it would be difficult for a deaf person to serve:

If there is evidence that a deaf juror cannot hear and hearing it is crucial/critical to a trial then the deaf juror can't serve as a juror. Some sort of risk assessment should occur. The juror would make a personal decision about that. If this only occurs rarely, then it makes sense that a deaf person is then put back into the pool.

Evidence might also be introduced during the trial that may be difficult for a deaf juror to evaluate, so they may have to be discharged in such circumstances later.¹⁰⁸

- 9.70 Vision Australia acknowledged that it 'is necessary to evaluate whether the trial is "inherently visual in nature"'. It was acknowledged that 'if so, ... a blind/low vision person would be unable to serve'.¹⁰⁹ It provided two potential examples, a jury being required to compare two graphic images in a trial about a trademark ownership dispute or CCTV being crucial to the determination of guilt or innocence.¹¹⁰
- 9.71 Peter Ward told the Commission that, as 'a person with low vision, there are things I can do and there are things I can't do. I have to recognise what I can't do'.¹¹¹ Similar comments were made in the consultation with Blind Citizens Australia. Some participants suggested that they would feel uncomfortable serving in a trial that involved lots of visual evidence. It was suggested it 'would be easier to serve when the trial involved mostly documentation or oral evidence from witnesses'.¹¹²

CCTV and identification evidence is not always material to a trial's outcome

- 9.72 Importantly, the legal community noted that voice and identification evidence is not always material to the outcome of a trial.¹¹³ For example, eyewitness accounts may also be relevant. Victorian Criminal Bar Association consultees noted that:

the Commission should guard against generalisations. Just because there is CCTV evidence, does not necessarily mean that a blind person cannot sit on the jury. The way in which the evidence is going to be used needs to be considered. For example, is it about identifying who a person is? In such a case they might be precluded, but this should be considered on a case by case basis, as not that many cases rely wholly on CCTV footage. Other CCTV evidence might be about what the person did or could they have done something else or nothing at all? This might be less crucial. It was observed that in the County Court many cases have no CCTV evidence.¹¹⁴

- 9.73 A member of the Victorian Criminal Bar Association referred to the evidence presented in *Latorre v The Queen*.¹¹⁵ A key piece of evidence was a voicemail message, and the jury was required to determine whether it was the applicant's voice on the line. In such cases, the evidence does not require expert testimony and is 'considered by the jury in the context of appropriate instructions by the judge'.¹¹⁶ This principle applies to both visual and voice identification evidence.¹¹⁷ Whether a deaf juror could serve in this type of situation should be determined by a judge. It was noted that these types of cases 'are not that common and should be viewed as exceptions'.¹¹⁸

108 Consultation 8 (Brent Phillips).

109 Consultation 7 (Vision Australia). Similar comments were made about a scenario where all the evidence was audio based and the prospective juror was deaf: see Submission 9 (Madison).

110 Submission 10 (Vision Australia).

111 Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

112 Consultation 1 (Blind Citizens Australia).

113 For example, Consultation 16 (Office of Public Prosecutions Victoria).

114 Consultation 4 (Victorian Criminal Bar Association).

115 *Latorre v The Queen* [2012] VSCA 280, (2012) 226 A Crim R 319. The original case concerned allegations of blackmail and extortion. The appeal considered the use of voice identification evidence and warnings given to juries about the use of that appeal evidence. Relevant for this report was the key issue of whether a message left on the phone from a telephone box was made by the accused.

116 Ibid [70].

117 Ibid [144].

118 Consultation 4 (Victorian Criminal Bar Association).

- 9.74 Similar comments were made in community responses.¹¹⁹ Vision Australia observed that, 'Just because a trial has some visual evidence doesn't mean a blind or low vision juror could not serve. It would need to be critical to the outcome of the trial'.¹²⁰ It identified that:

The key to prima facie exclusion of a prospective juror who is blind or has low vision is whether each juror must arrive at their own interpretation of visual material and whether the jury's interpretation will affect the outcome of the trial ... We feel that such situations would be relatively uncommon.¹²¹

The importance of an individual assessment

- 9.75 Blind Citizens Australia argued that any assessment of a person's ability to serve as a juror should only take place 'after support services provided to perform jury service are considered'. Only then 'can difficulty performing jury service on the basis of blindness or vision impairments be grounds for being excused from jury service on the basis of the blindness or vision impairment'.¹²²

- 9.76 Supreme Court consultees noted in consultation that:

In most cases there should not be any issues with service if supports can be provided reasonably. However, it is hard to know in the abstract how often it will not be appropriate for a person with an impairment to serve. It is unclear how much of the evidence must be of concern (eg because it is audio only) before the case becomes unsuitable for a person with an impairment to serve as a juror. ... These issues would probably need to be determined on a case by case basis.¹²³

- 9.77 VLA submitted that:

VLA supports giving the judge the power to decide on a case by case basis, with the overriding test being the interests of justice in each case. Given the interrelationship between the potential juror's individual impairments, the nature of the evidence, and the nature of the key issues at trial, as well as the rapid advancements in both technological supports and forensic evidence, it is not practical to set specific exclusions or exhaustive criteria.¹²⁴

- 9.78 In Chapter 11 the Commission recommends that the trial judge make the final decision about jury service with adjustments. If it is clear at the start of the empanelment process that a person is not able to comprehend evidence that is material to the outcome of a trial, that person should not serve on that particular trial. The question of whether certain evidence is material to the outcome of a trial, and the potential juror's ability to perform their role, should be determined by a trial judge. If this issue arises after the trial has commenced, then the judge may decide to discharge that juror, as they already have the power to do.¹²⁵

Other evidentiary concerns

- 9.79 The Supreme Court provided examples of cases:

that do not turn upon voice or visual identification evidence but involve such a significant volume of audio-only or visual-only evidence that allowing someone in the subject groups to serve as a juror would create an unacceptable risk of prejudice to the accused. For example, a trial involving a high volume of recordings from surveillance devices and telephone intercepts where the jury is invited to draw conclusions based on tone or emphasis. Another possible example is a trial heavily reliant on visual observations, where a jury may be taken on a view of a crime scene as a critical part of the evidence.¹²⁶

119 For example, Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

120 Consultation 7 (Vision Australia).

121 Submission 10 (Vision Australia).

122 Position Statement 1 (Blind Citizens Australia).

123 Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

124 Submission 8 (Victoria Legal Aid).

125 *Juries Act 2000* (Vic) s 43(d).

126 Submission 11 (Supreme Court of Victoria).

- 9.80 The LIV provided the example of CCTV and driving cases involving maps and reconstructions which might be difficult for a blind person to access.¹²⁷ However, the LIV noted it should be up to the judge to 'assess their capacity based on the facts, evidence and arguments the trial will involve'.¹²⁸
- 9.81 The County Court submission raised concerns about breaks for Auslan interpreters extending the duration of a trial. It was suggested that 'this will also impact on other jurors and court resources' including 'the rights of the accused to a fair trial and the swift administration of justice'.¹²⁹ The Commission has been told that Auslan interpreters generally work in pairs so that they can relieve each other in a seamless manner. They will need occasional breaks because the work is exhausting, but regular disruptions to the trial are not anticipated.
- 9.82 All of these factors would need to be considered by the trial judge in making an assessment about whether it is reasonable to provide adjustments in a particular trial (see Chapter 11).

Safeguards can protect the right to a fair trial

- 9.83 It is possible to uphold the right to a fair trial and involve people in the subject groups as jurors. In Chapter 10 we examine practices in overseas jurisdictions where judges have comparable obligations to uphold a fair trial and where people in the subject groups have been serving as jurors for many years.
- 9.84 As noted earlier in the chapter, there are already extensive mechanisms aimed at ensuring impartiality and a fair trial.¹³⁰ These apply to all potential jurors, including people in the subject groups. The Victorian Criminal Bar Association consultees told the Commission that:

a juror can be discharged at any time during a case (the example was provided of a juror who found sitting to be too emotional and stressful, so they asked to be discharged after one day), so this should not be a big issue. If a juror doesn't want to be there they shouldn't be there. Most jurors have no idea what it is like to be in a trial. ... There are lots of options available to the parties to address issues with jurors as they come up.¹³¹

A cautious approach to additional safeguards

- 9.85 In recommending additional fair trial safeguards relating to the use of reasonable adjustments, the Commission is conscious of not making it overly difficult for people in the subject groups to participate. As one consultation participant noted:

It will be brilliant to have the opportunity to sit on a jury. However, we should not have to jump through an exhausting range of hoops to do so.¹³²

- 9.86 It is important that people in the subject groups do not feel that their participation is receiving more scrutiny than others in the community. We do not assess the competency of other jurors unless their impartiality or ability to perform their role comes into question. As Alastair McEwin noted:

If you select a random group of people, you might find one of them falls asleep during the hearing, one is a misogynist, one didn't finish year 12, etc. There are all types of people in the community, with all types of strengths and weaknesses.¹³³

¹²⁷ Consultation 2 (Law Institute of Victoria).

¹²⁸ Submission 7 (Law Institute of Victoria).

¹²⁹ Submission 14 (County Court of Victoria). The OPP also raised concerns that if trials run for longer because of reasonable adjustments this may impact the ability of other people to serve. Consultation 16 (Office of Public Prosecutions Victoria).

¹³⁰ Ibid.

¹³¹ Consultation 4 (Victorian Criminal Bar Association).

¹³² Consultation 6 (Deaf Victoria and community participants).

¹³³ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

9.87 One survey respondent noted that:

In the few cases where being able to hear or see is an inherent requirement of doing the 'job' of a juror, then fine. But in that case, I hope you'll be testing the sight and hearing of every potential juror. Not to mention written and spoken English comprehension which surely is a more frequent requirement.¹³⁴

9.88 Similarly, consultation participants from Deaf Victoria noted that:

deaf people have to justify why they are not only up to the task but ten times better than anyone else so that they can participate in a normal process.¹³⁵

9.89 The researchers who ran the mock trial for deaf jurors in New South Wales suggested that the 'spectrum of ability in the community should be highlighted so that judges don't apply too strict a judgement on whether a deaf juror can serve at the outset'.¹³⁶

9.90 As the Victorian Criminal Bar Association consultees observed, we do not ask people about their mental state, their IQ, or whether they are biased, 'we just trust them to raise any issues that will preclude them from sitting on the jury'.¹³⁷

9.91 Alastair McEwin warned that there is a tendency to focus on the most extreme scenarios or barriers for people with disabilities. Instead, reform should focus on 'the bigger picture ... Let's not get too caught up in the exceptions. Let's work towards finding a solution'.¹³⁸

Empanelling extra jurors

9.92 The Commission was asked to consider if it is necessary to empanel additional jurors as a back-up in case a juror from the subject groups is unable to perform their role during trial. The extra juror 'could then be cast off prior to the deliberations as with other trials if not needed'.¹³⁹ The Office of Public Prosecutions observed that:

Trial estimates often blow out due to unforeseen circumstances such as witness unavailability. A person who requires supports may decide after a time that it is too difficult for them to continue. Additional jurors would become a backup as occurs in the case of long trials.

Another conceivable scenario would be if evidence is adduced that was not foreseen and that could not be evaluated adequately by the juror with hearing or vision loss. In such circumstances, there might be a role for an additional juror to replace the juror who has vision or hearing loss.¹⁴⁰

9.93 The Commission does not support this idea for three reasons:

- 1) In Chapter 11 we recommend an assessment process to determine if the person from the subject groups is able to serve. The potential juror will also be well briefed about their role (more so than any other member of the community) so it is unlikely that they will be surprised by what is expected of them. While there is a chance that they will not be able to continue to serve as a juror (for example, if evidence is adduced that was not initially anticipated and they have difficulty accessing that evidence), this risk is not any higher than for any other juror.

134 Online Survey (Response 4).

135 Consultation 6 (Deaf Victoria and community participants).

136 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

137 Consultation 4 (Victorian Criminal Bar Association).

138 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

139 Consultation 16 (Office of Public Prosecutions Victoria).

140 Ibid 9.

- 2) There is already a provision in the Act that allows extra jurors to be empanelled.¹⁴¹ If a juror must be discharged,¹⁴² the court can order that the trial continues with a smaller jury.¹⁴³ Therefore, no amendments to the Act are required to address the concerns raised.
 - 3) The process by which a surplus juror is cast off (known as balloting-off)¹⁴⁴ can be very upsetting for those who are removed.¹⁴⁵ In the jury empanelment report the Commission recommended that section 48 should be repealed to end the balloting-off process and that it was preferable to allow the taking of a verdict from an enlarged jury.¹⁴⁶
- 9.94 Ultimately, empanelling an extra juror when a person from the subject groups is serving would undermine the system of assessment recommended in this report in Chapters 11 and 12. It could also be perceived to perpetuate discrimination against the affected juror, by creating a public expectation that they will not be able to perform their role. It will possibly also have an effect on the other jurors, who may perceive that the affected juror is not capable and is likely to be discharged anyway. The Commission's preferred option is to rely on existing powers for a juror to be discharged if necessary and for the trial to proceed with a reduced jury.

Steps to safeguard the right to a fair trial

- 9.95 In the Commission's view, the following steps, outlined in Chapters 11 and 12, can safeguard the right to a fair trial.
- A comprehensive assessment of the provision of reasonable adjustments should be conducted by Juries Victoria, involving the person from the subject groups and subject to clear legislative guidance.
 - A judge should make the final decision about the ability of a person in the subject groups to perform jury duty in a particular trial.
 - An interpreter or support person should provide an oath to the Court to maintain the confidentiality of deliberations and not get involved in the process and be subject to penalties for breaches of obligations.
 - An interpreter or support person should meet certain basic training requirements and comply with standards and a code of conduct (discussed in Chapters 14 and 15).

141 Before the jury is empanelled the court may empanel up to three additional jurors in a criminal trial, in a civil trial. The court may consider the trial's length, nature and any other factor that may result in discharge during a trial: see *Juries Act 2000* (Vic) s 23(1), (2).

142 Judges have powers to discharge a juror when a trial has commenced if it appears to the judge that the juror is not impartial, the juror becomes incapable of continuing to act as a juror, the juror becomes ill or for any other reason that the judge thinks the juror should not continue to perform the role: *ibid* s 43; Consultation 4 (Victorian Criminal Bar Association).

143 A trial can continue with a reduced jury under the direction of the judge pursuant to *Juries Act 2000* (Vic) s 44(1). A civil trial cannot continue with fewer than five jurors and a criminal trial cannot continue with fewer than ten, sections 44(2) and 44(3) respectively.

144 If additional jurors are empanelled and remain by the time a jury is required to consider its verdict, a ballot must be conducted by selecting the number of jurors necessary to reduce the jury to 12 or 6 (as required) before the jury retires to consider the verdict. See *Juries Act 2000* (Vic) 48(1); see also Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 78–99.

145 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 84–5 [5.43]–[5.58].

146 *Ibid* 95–97.

CHAPTER 10

Inclusive juries in other jurisdictions

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10. Inclusive juries in other jurisdictions

Yes, I did have to wait around the courthouse for hours. It was inconvenient, but I did serve on a jury. I had the assistance I needed to read printed materials submitted as evidence at the trial. And, as I look back, I am truly glad that I chose to fulfill my duty as a citizen. Jury duty was educational and rewarding¹
—Comment made by a blind juror in the United States in 1991

If they can see that I can do it ... Then they know that they can do it, too.²
—Comment by a deaf juror in the United States in 2015

Overview

- Other jurisdictions have already removed barriers to participation for jurors from the subject groups while upholding the right to a fair trial and maintaining the efficiency of the jury trial system.
- People in the subject groups have successfully served on juries overseas for some time. This happens flexibly and without controversy.
- Recent reforms in the Australian Capital Territory and practice overseas have provided valuable guidance in developing our recommendations.

Changes to jury selection in Australia

Reform in the Australian Capital Territory

- 10.1 In 2018, the Australian Capital Territory (ACT) became the first jurisdiction in Australia to amend its laws to require consideration of 'reasonable supports' and to limit the application of the 13th person rule. The changes to the law in the ACT are broader than those contemplated in this report because they apply to people beyond the subject groups.

¹ Comment by a blind juror in the United States: Gwen Nelson, 'My Experience as a Juror', *National Federation of the Blind (US)* (Web Page, March 1991) <<https://nfb.org/sites/www.nfb.org/files/images/nfb/publications/bm/bmg1/brlm9103.htm>>.

² Experience of deaf woman, Tracy Straub, serving on a Detroit jury in the United States: Elisha Anderson, 'Deaf Juror Glad to Do Her Duty for Justice's Sake', *USA Today* (online, 10 May 2015) <<https://eu.usatoday.com/story/news/nation/2015/05/10/deaf-juror-glad-duty-justices-sake/27068733/>>.

- 10.2 When the legislation was read before the Parliament, Minister for Mental Health Shane Rattenbury noted that the provision of reasonable supports is 'consistent with decisions of the UN Committee on the Rights of Persons with Disabilities'.³ Attorney-General Gordon Ramsay commented:

All Canberrans should be able to participate in the ACT's legal processes, regardless of sex, ethnic origin, religion, language or disability status, and, with that goal in mind, as has been well noted by other speakers, this bill introduces provisions to support the participation of people with disabilities or language difficulties as jurors.⁴

- 10.3 The *Juries Act 1967* (ACT), amended in 2018, puts a positive obligation on the trial judge to consider if 'reasonable support' could be provided to enable a person with disability or insufficient understanding of the English language to properly discharge their duties if they wish to serve and are not otherwise excused. If satisfied that supports could reasonably be given, the judge must make a direction for supports to be provided.⁵
- 10.4 The legislation lists some considerations for assessing whether supports can be reasonably provided.⁶ If the judge makes a direction allowing an interpreter or support person to assist the juror, the common law rule against having a non-juror in the jury room is limited by the Act,⁷ subject to the interpreter or the support person agreeing to take an oath or affirmation that they will not participate in or disclose anything about those deliberations.⁸
- 10.5 At the time of writing no one has yet served as a juror or attended as a panel member with a support person or Auslan interpreter in the ACT. We understand from the sheriff that enquiries have been made about the use of supports but those pool members have subsequently asked to be excused from jury service.⁹

Reform in the Federal jurisdiction

- 10.6 Jury trials are also available in the Federal Court of Australia. In 2009, the Federal Court was conferred with the power to hear indictable criminal cases in relation to cartel offences contained in sections 45AF and 45AG of the *Competition and Consumer Act 2010* (Cth).¹⁰
- 10.7 No legislative reforms have been made to enable the Court to implement reasonable adjustments to facilitate access for people in the subject groups. However, under the *Federal Court of Australia Act 1976* (Cth), the sheriff, in exercising the power to excuse a potential juror due to their 'inability, in all the circumstances, to perform the duties of a juror to a reasonable standard' (on application of the person, or on their own initiative) 'must have regard to the *Disability Discrimination Act 1992* [Cth]'.¹¹
- 10.8 All Federal Court buildings have wheelchair access and are equipped with hearing loops. All jury boxes are designed to accommodate people in wheelchairs.¹² Further, the Federal Court's website states:

The Federal Court of Australia does not discriminate against any person with a disability and will make reasonable adjustments to enable a person with a disability to take part in jury service. If you consider that your disability will impact your ability to serve as a juror, you should provide details. You may also consider providing a letter from your medical provider or a copy of a health card or similar document which confirms details of your disability.¹³

3 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 March 2018 755 (Shane Rattenbury).

4 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 March 2018 758–9 (Gordon Ramsay, Attorney-General); Courts and Other Justice Legislation Amendment Bill 2018 (ACT).

5 *Juries Act 1967* (ACT) s 16.

6 *Ibid* s 16(3).

7 *Ibid* s 16(4)(a).

8 *Ibid* s 16(4)(c).

9 Information provided by ACT Sheriff to Victorian Law Reform Commission, 30 May 2022. We note that no records are kept by the court about the use of hearing loops.

10 Information provided by Judicial Registrar, Crime, Federal Court to Victorian Law Reform Commission, 15 December 2021.

11 See *Federal Court of Australia Act 1976* (Cth) s 23DQ(2)(e) and s 23DR(1)(a), respectively.

12 Information provided by Judicial Registrar, Crime, Federal Court to Victorian Law Reform Commission, 24 June 2022.

13 Federal Court of Australia, *Requests to be Excused from Jury Service* (Information Sheet No 3, July 2021).

- 10.9 The Federal Court's first jury trial was conducted in 2021. It was a 12-week trial held in Melbourne. The Court empanelled 14 jurors.¹⁴ One of the jurors at the trial wore a hearing aid, and informed the deputy sheriff. The Court made the following adjustments:
- consulting with the juror and requesting the juror to seek advice from their treating health practitioner as to the best options available for the juror to participate in the trial as a juror
 - moving the juror to a place in the jury box that enabled optimal audio range
 - moving counsel, when speaking, to ensure that their voice could be heard clearly by the juror
 - implementing a trial-specific procedure with the Court's transcription provider to have technicians 'soundcheck' multiple times during the day
 - the Court purchasing an audio device that was compatible with the juror's hearing aid so the Court's audio loop could be effectively utilised
 - the trial judge regularly checking with the jury as to whether evidence and trial participants could be clearly heard. These checks are recorded in the transcript.¹⁵
- 10.10 The Federal Court juries officer manuals reflect the practices implemented in the Melbourne trial.¹⁶
- 10.11 Regarding the provision of training for court staff, the Federal Court Judicial Registrar (Crime) and Deputy Sheriff told the Commission:
- The Court provides all Court employees with equity and diversity training. In addition to this training the Jury Team, prior to each trial, is provided training in respect of jury management and includes training in respect of the manuals.¹⁷
- 10.12 The Federal Court has told the Commission that in 2019 the Federal Government announced plans to expand the Federal Court's jurisdiction in relation to corporate crime. If this occurs it is expected to significantly increase the number of jury trials conducted in the Court.¹⁸

Status of reforms in other Australian states and territories

- 10.13 Other states and territories in Australia have not removed barriers to participation in jury service for people with disabilities. They all have similar legislation to Victoria that either 'refers to disability as a ground for disqualification from serving as a juror or implies that persons with disability may be disqualified on the grounds that they are not capable of performing the duties of a juror'.¹⁹ The Northern Territory is the only jurisdiction that expressly states 'a person who is blind, deaf or dumb or otherwise incapacitated by disease or infirmity from discharging the duties of a juror'.²⁰

¹⁴ Information provided by Judicial Registrar, Crime, Federal Court to Victorian Law Reform Commission, 15 December 2021. The Commission understands that several additional cartel jury trials are listed in Sydney and Melbourne in 2022.

¹⁵ Ibid.

¹⁶ Information provided by Judicial Registrar, Crime, Federal Court to Victorian Law Reform Commission, 24 June 2022.

¹⁷ Information provided by Judicial Registrar, Crime, Federal Court to Victorian Law Reform Commission, 15 December 2021.

¹⁸ Ibid. The Federal Court referred the Commission to the Government response to the Final Report of the Royal Commission into Misconduct in Banking, Superannuation and Financial Services Industry: see Treasury (Cth), *Restoring Trust in Australia's Financial System—The Government Response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Report, 4 February 2019).

¹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 234 [7.207]. We set out the relevant legislation in other Australian states and territories in our Consultation Paper: Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) Appendix A. The Western Australian Department of Justice (WADOJ) published a consultation paper in 2020 exploring possible amendments to the *Juries Act 1957* (WA) to ensure people with disabilities can participate as jurors: Department of Justice (WA), *Participation of People with a Disability in Jury Service* (Discussion Paper, March 2020) 3 [5.1]–[5.5]. No information was available publicly at the time of writing about the WADOJ findings or any proposed changes to the law or practice in Western Australia.

²⁰ *Juries Act 1962* (NT) s 11, sch 7.

Inclusive juries in the United States

- 10.14 The inclusion of people from the subject groups on juries in the United States has occurred for over three decades and is relatively routine.²¹ We discussed American processes in more detail in the consultation paper.²²
- 10.15 As long ago as 1984 the New York Supreme Court recognised that there is no longer a social or legal justification for excluding people who are deaf from juries:
- The deaf are not poor creatures to be patronized by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside ... the deaf are a part of our community and must be considered, evaluated, and finally either accepted or rejected for service as individuals just as any other citizen ... The grounds for exempting the deaf from jury service have vanished.²³
- 10.16 The *Americans with Disabilities Act 1990* (ADA) in the United States prevents jurors from being excluded simply because of their disability. The ADA states that:
- no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.²⁴
- 10.17 The ADA provides that people with disabilities have rights to access everyday things,²⁵ including government services, which extends to the courts and jury service.²⁶ Courts are public entities for the purposes of the ADA.²⁷
- 10.18 The ADA mandates the provision of 'reasonable accommodations'.²⁸ What constitutes a 'reasonable' accommodation has been subject to frequent litigation.²⁹ Ultimately, the trial judge makes a ruling in the context of the specific case. We listed examples of these accommodations in the consultation paper.³⁰
- 10.19 All courtrooms in the United States must be built in compliance with the ADA, to be accessible, with ramps and room to move. The accommodations commonly available include:
- CART (computer assisted real time transcription)
 - qualified American Sign Language interpreters
 - court reporters who write up everything that is spoken in real time
 - hearing loops
 - line-of-sight adjustments.³¹

21 Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 23–24.

22 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) Appendix A.

23 *People v Guzman*, 478 NYS 2d 455, 474 (Goodman J) (1984).

24 *Americans with Disabilities Act*, 42 USC Ch 126 §12132 (1990): see also s 1210, which relates to the overall purpose of title 42 of the ADA. See generally Kristi Bleyer, Kathryn Shane McCarty and Erica Wood, 'Access to Jury Service for Persons with Disabilities' (1995) 19(2) *Mental and Physical Disability Law Reporter* 249, 249.

25 *Americans with Disabilities Act*, 42 USC Ch 126 (1990). The ADA is divided into five different sections called titles. Different titles set out the requirement under the Act for different organisations in the US: Title 1 (employment); Title 2 (state and local government); Title 3 (business and non-profits serving the public); Title 4 (telecommunication companies); Title 5 (other requirements regarding the implementation of the law): see Civil Rights Division, United States Department of Justice, 'Introduction to the ADA', *Information and Technical Assistance on the Americans with Disabilities Act* (Web Page).

26 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

27 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 19l (DDC, 1993). See also the New York courts information page about the application of the ADA to the courts and the right to accommodation: Office of Court Administration, New York State Unified Court System, 'Reasonable Accommodations for Court Users', *NYCOURTS.GOV* (Web Page) <http://www2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml>. The *Rehabilitation Act*, 29 USC (1973) prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance and in Federal employment. Federal Courts in the United States are covered by this act, which has the same substantive requirements as the ADA: see especially, s 504.

28 *Nondiscrimination on the Basis of Disability in State and Local Government Service*, 28 CFR Part 35 (1 July 2021) [7]. See also Office of Court Administration, New York State Unified Court System, 'Reasonable Accommodations for Court Users', *NYCOURTS.GOV* (Web Page) <http://www2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml>.

29 See, eg, *People v Guzman*, 478 NYS 2d, 458 (1984).

30 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) l4, 38l. See also Department of Justice (US), *The Americans with Disabilities Act: Title II Technical Assistance Manual* (Manual) <<https://www.ada.gov/taman2.html>>; *People v Guzman*, 478 NYS 2d (1984).

31 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

- 10.20 The New York State Court's website lists additional accommodations, including:
- copies of documents in large print, Braille, screen readable or audio formats
 - making reasonable modifications in practices or procedures, including, for example:
 - relocating a proceeding to a physically accessible courtroom for a person with a mobility impairment
 - filling out a court form for a person with an impaired ability to write by hand
 - permitting the use of a service animal by a person who is blind or otherwise relies on a dog trained to do work or perform a task
 - reasonable modifications to courtroom practices and procedure made by a judge presiding over a matter.³²
- 10.21 Numerous United States jurisdictions have specifically enacted the right of individuals with disability to serve on juries, explicitly including deaf people. They require the provision of accommodations, including court-appointed and funded sign language interpreters, and have developed policies and guidelines to this effect. Additionally, many state and local courts have entered into formal and informal 'settlement agreements' to provide accommodations and supports for people with disabilities, in order to comply with the ADA. Some states also provide staff training on disability.³³
- 10.22 In the United States, the 13th person rule has been held not to extend to a sign language interpreter. In *People v Guzman* it was held that the rule applies to officers of the court such as bailiffs, judges, or counsel, but 'the presence of the signer is a different matter entirely'³⁴ because 'the role of the signer is not that of a participant or an authorized official of the court but is that of a communications facilitator'.³⁵
- 10.23 In *United States v Dempsey*, the court found it no more likely that an interpreter would reveal confidences than the jurors themselves.³⁶ It held that the sign language interpreter was unlikely to have a 'chilling effect' on deliberations—'that is, whether it will inhibit the frankness of the discussion and deprive the eventual verdict of legitimacy'—because they are 'part of the background' rather than 'independent participants'.³⁷
- 10.24 In the *Dempsey* case Judge Logan considered that 'an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room'. It was concluded that concerns about the interpreter could be addressed through an oath and by the judge asking before the verdict whether the interpreter abided by their oath.³⁸

Unique features of the United States jury selection process

- 10.25 There are important differences between the jury selection approach in the United States, compared to Victoria.³⁹ Jurors may be permitted to speak about the case after a verdict has been reached, subject to any orders by the judge.⁴⁰ Further, in the United States a 'voir dire' questioning process applies to the selection of jurors. During a voir dire counsel asks questions of prospective jurors to assess their values and sympathies,

32 Office of Court Administration, New York State Unified Court System, 'Reasonable Accommodations for Court Users', *NYCOURTS.GOV* (Web Page) <http://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml>.

33 National Center for State Courts, *Enforcement Activities under the Americans with Disabilities Act Title II: Programs, Services and Activities of State and Local Courts 1994-2004* (Report, June 2004).

34 *People v Guzman*, 478 NYS 2d, 472 (Goodman J) (1984).

35 Ibid 473 (Goodman J).

36 *United States v Dempsey*, 830 F 2d 1084, 1090 (Logan J) (10th Cir, 1987).

37 Ibid 1090 (Logan J).

38 Ibid 1090, 1092 (Logan J).

39 See, eg New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 36-38.

40 *United States v Dempsey*, 830 F 2d 1084, 1089 (10th Cir, 1987): Circuit Judge Logan notes 'There is no strict secrecy rule; jurors are not prohibited by law from discussing their deliberations after the case is over'. See also Judicial Conference of the United States, *Handbook for Trial Jurors Serving in the United States District Courts* (Handbook No HB 100, Administrative Office of the United States Courts, 2006) 14 <https://img.nyed.uscourts.gov/files/local_rules/trialhandbook.pdf>. This is in contrast to jurors in Victoria who are bound by secrecy under the *Juries Act 2000* (Vic) s 65.

and may challenge the selection of jurors based on the answers they provide and the impressions counsel have.⁴¹ Questions can be asked about:

marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests.⁴²

- 10.26 Despite differences between the United States and Victorian systems, the United States example is instructive due to the regular and long-term inclusion of people with disabilities on juries. The New South Wales Law Reform Commission has observed that 'what are sometimes claimed to be insurmountable obstacles here, seem to have caused little impediment to reform [in the United States], and with no evident ill effect'.⁴³

Juries in Monroe County, New York State

*We will always err on the side of allowing people to serve. We rarely, if ever, deny an accommodation request.*⁴⁴—Jury Commissioner, New York State Courts in Rochester, Monroe County, United States

- 10.27 The Commission spoke to the Jury Commissioner for Monroe County, Rochester, New York State. Rochester is home to the National Technical Institute for the Deaf, an institution that trains deaf people for technical careers.⁴⁵ The city has one of the largest deaf populations per capita in the United States.⁴⁶ Napier and colleagues note that 'As a consequence, the Monroe County Courts have a well-established system to provide ASL interpreters as an accommodation to allow deaf people to serve as jurors'.⁴⁷ Each year, approximately six deaf ASL users are sworn in as jurors.⁴⁸ The Jury Commissioner advised us that the court schedules one deaf juror for jury selection every week but not all progress to jury service.⁴⁹
- 10.28 Only a small number of blind people have served in Monroe County. We were told that 'typically people have other medical conditions and the combination of them usually entitles them to a medical excusal from jury service'.⁵⁰
- 10.29 At every stage of the process, from the jury summons through to the jury selection process and the trial itself, accommodations are provided to jurors from the subject groups. The Commission has drawn on this process in making the recommendations for Victoria. Key parts of this process are:
- Potential jurors are randomly selected and sent a qualification questionnaire. Eligible people are then included in the Jury Commissioner database.
 - Arrangements are only made to accommodate a juror with a disability once they are summonsed. The Jury Commissioner sends out about 100 jury summonses a week. In response to the summons, a person can contact the Jury Commissioner to advise that they have a hearing or vision loss and require reasonable accommodations.

41 Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34(3) *Criminal Law Journal* 167, 178–80.

42 Phylis Skloot Bamberger, 'Jury Voir Dire in Criminal Cases' (2006) 78(8) *New York State Bar Association Journal* 24, 26.

43 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 44.

44 Requesting a wheelchair is a notable exception to this rule. Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

45 'National Technical Institute for the Deaf', *Rochester Institute of Technology* (Web Page) <<https://www.rit.edu/ntid/>>.

46 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States). See also Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 254: 'There is estimated to be 90,000 deaf ASL users in a population of 700,000 living in Rochester'.

47 Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 254.

48 Ibid 254–5.

49 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

50 Ibid.

- The Jury Commissioner can excuse a person on the basis of their response to either the qualification questionnaire or the summons. Once a person is in a courtroom, only the judge can excuse them.
- Once all the potential jurors have been given an orientation outlining their duties and responsibilities, the Jury Commissioner's computer system randomly assigns them to the trials. The Jury Commissioner told us:

The law gives the Jury Commissioner broad power to organize the jury pool so long as random selection is maintained, while at the same time recognizing that jurors need to be deferred to new dates to accommodate not only disabilities, but also their employment, travel plans and other commitments. It is under this authority that I schedule deaf jurors. The jurors are first randomly selected then are deferred to accommodate their needs.

We do our best to accommodate people who show up at the courthouse without any advance notice but, if it is for jury service, we defer them to a new date.⁵¹

- If a request for accommodation is denied, a person can seek a review of that decision.
- If the potential juror is deaf, a sign language interpreter is needed for their induction and the jury selection process as well as for the trial (if they are selected to serve). 'A team of interpreters is also put on standby in case the deaf juror is empanelled for a full trial'.⁵²
- Sign language interpreters are allowed to be present in the jury room. The interpreter must give an oath or affirmation to enter the jury room. The court's ASL interpreter is an officer of the court and does not need to be sworn in every time. Other freelance ASL interpreters who regularly interpret in the court are sworn in by a court clerk in front of a judge when they start to interpret in the courtroom.⁵³
- To serve on a jury in New York State people must 'be able to understand and communicate in English'. This is 'broadly interpreted to include American Sign Language'.⁵⁴
- If there is a question about the ability of a prospective juror to serve in a particular trial, even with communication aids, this will be determined by a judge during the voir dire.⁵⁵

The experience of jurors in the United States

- 10.30 The National Federation of the Blind's newsletter, *Braille Monitor*, contains personal stories from people who are blind about their experiences of the jury process in the United States. We referred to some of these in our consultation paper.⁵⁶
- 10.31 Jim Moynihan detailed his experience of serving on a jury in Missouri in 2002.⁵⁷ He noted that when he initially reported to the courthouse in response to his summons he was told by the court clerk that he was excused because he was blind. He informed the clerk that he 'did not wish to be excused on the grounds of blindness and would serve if selected'. Mr Moynihan was subsequently selected to serve and reported that:

It bothered me that the clerk was willing to excuse me from serving on a jury based on blindness, and it shocked her that I wanted to serve if selected. Yet other citizens are expected to serve on juries unless they come up with a legitimate excuse. We all

51 Ibid.

52 Jemina Napier et al. 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 254.

53 Information provided by Jury Commissioner, Monroe County, New York State, United States to Victorian Law Reform Commission, 17 June 2022.

54 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

55 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States); Office of Court Administration, New York State Unified Court System, 'Jurors—Questions and Answers (FAQ's)', *NYCOURTS.GOV* (Web Page, 8 December 2020) <<https://www.nyjuror.gov/juryQandA.shtml#Q12>>. See also Office of Court Administration, New York State Unified Court System, 'ADA Accommodation Request Process', *NYCOURTS.GOV* (Web Page) <<http://www2.nycourts.gov/ada-accommodation-request-process-32956#how1>>.

56 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) Appendix B, 11–13.

57 James Moynihan, 'Blind Juror' (2003) 46(7) *Braille Monitor* <<https://nfb.org/resources/publications-and-media/braille-monitor/archive>>.

know that blind people are excused from working because others expect that society will take care of us. [...] I was impressed that the people on my jury took their task seriously. They grappled with issues presented by the attorneys and tried to arrive at a fair and equitable solution. We came from all walks of life and had never met before. We were of different races and levels of education. We tried our best to hammer out a reasonable and fair settlement [...] I would do it again if called upon. You can turn me down for any of a number of reasons, but don't let my blindness be one of them.⁵⁸

- 10.32 In 2021, Dana Ard, a blind juror from Idaho, explained that she 'took Braille notes on all of the witness testimony as well as the guidance from the judge on what we had to consider when deciding this case...'. She commented that she was 'proud to have been able to exercise my civic responsibility as a juror. I am hopeful that my service will demonstrate to judges and attorneys that blind people should not be disqualified from jury service based solely on blindness'.⁵⁹
- 10.33 In 2015, Tracy Straub, who was born deaf, served as juror in an armed robbery case in Wayne County Circuit Court, Detroit. She welcomed the chance to be involved:
- 'I've got a lot of friends that are deaf and have never served jury duty before,' Straub told the *Free Press* through an interpreter. 'So I'm kind of the rock star in that way'.⁶⁰
- 10.34 In this trial in Detroit, it was reported that the interpreters took turns interpreting for 15 to 20 minutes each. They stood at the front of the courtroom, near the court reporter. It was noted that during proceedings Ms Straub's eyes 'shifted between witnesses on the stand, exhibits displayed on a TV screen and sign language interpreters'. About deliberation Ms Straub said, 'I did have an interpreter there while we discussed and deliberated ... The interpreter basically acts as my voice and my ears'.⁶¹
- 10.35 Laurie Finch, owner of University Translators Services, explained in a media report about the case that the interpreters 'don't interject an opinion, they don't offer advice, they don't advocate. ... They strictly interpret'.⁶²
- 10.36 Wayne County Circuit Judge Timothy Kenny, who presided over the trial in Detroit, said the court 'is ready to accommodate any resident summoned for jury duty', explaining that:
- We are very interested in making sure Wayne County residents participate in jury service. [...] We are certainly willing to make the appropriate accommodations to ensure that everyone can in fact participate.⁶³
- 10.37 The Jury Commissioner for Monroe County suggested that it may be more difficult for a blind person to serve as a juror where a juror needs to watch videos and analyse photographic exhibits.
- 10.38 The Jury Commissioner provided an example of a blind juror who served in a minor criminal trial in which the accused was charged with violating a protection order. The question in issue was whether the order had been breached or not. Importantly, 'there was no visual evidence that the juror had to evaluate. The judge read out the contents of the protection order to the jury. Court deputies assisted the juror with navigation. The blind juror deliberated with everyone and helped reach a verdict'.⁶⁴

58 Ibid.
 59 Dana Ard, 'My Jury Experience' (2021) 64(7) *Braille Monitor* <<https://nfb.org/images/nfb/publications/bm/bm21/bm2107/bm210713.htm>>.
 60 Elisha Anderson, 'Deaf Juror Glad to Do Her Duty for Justice's Sake', *USA Today* (online, 10 May 2015) <<https://eu.usatoday.com/story/news/nation/2015/05/10/deaf-juror-glad-duty-justices-sake/27068733/>>.
 61 Ibid.
 62 Ibid.
 63 Ibid.
 64 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

- 10.39 In this trial the juror did not have any support in the jury room. The Jury Commissioner spoke with the blind juror after the trial and noted that the juror was:
- able to repeat the directions and the order of the judge verbatim. She had an amazing memory and an ability to recall information. ... this scenario certainly supported the proposition that people who are blind or who have vision loss have compensated for this through other senses and often have extremely well developed memory and hearing.⁶⁵

Inclusive juries in England and Wales

*Disability should not be a barrier to people carrying out this most important civic duty. I am delighted we can open up jury service to many thousands more people and ensure our justice system becomes as accessible and inclusive as possible.*⁶⁶ —Lord Chancellor, Robert Buckland QC MP, March 2021

- 10.40 People with disabilities, including those who are deaf, hard of hearing, blind or have low vision, are not disqualified from serving under the *Juries Act 1974* (UK) (in operation in England and Wales).⁶⁷
- 10.41 Where a person with physical disability is summonsed for jury service, a senior court official will consider whether accommodations can be provided to enable them to serve. Where there is doubt about the potential juror's 'capacity to act effectively as a juror' because of disability, the person may be brought before a judge pursuant to section 9B⁶⁸ who will determine 'whether or not the person should act as a juror'.⁶⁹ The prospective juror can attend the hearing to discuss the adjustments they would need with the judge.⁷⁰ The judge:
- shall affirm the summons unless he [sic] is of the opinion that the person will not, on account of his [sic] disability, be capable of acting effectively as a juror, in which case he shall discharge the summons.⁷¹
- 10.42 Until 2022, the 13th person rule prevented all non-jurors from facilitating jury service for jurors with disabilities in the jury room. However, there have been protocols in place in England and Wales for some time to accommodate jurors with disabilities to enable them to serve within the limits of the 13th person rule, for example enabling deaf jurors who can lip-read to serve. In 2022 the law changed to allow a British Sign Language (BSL) interpreter to work alongside a juror in jury deliberations (discussed below).⁷²
- 10.43 In 2001, Lord Justice Auld noted that changes in the 1990s:
- effectively established a presumption that people with disabilities attending court in response to a summons can serve on juries.⁷³

65 Ibid.

66 'Law Change Opens Doors for Deaf Jurors in England and Wales', *Hearing Link* (Web Page, 17 March 2021) <<https://www.hearinglink.org/news/202103/law-change-opens-doors-for-deaf-jurors-in-england-and-wales/>>.

67 *Juries Act 1974* (UK) s 1.

68 Ibid s 9B(1).

69 Ibid s 2. 'The judge' is defined in the relevant section as (a) any judge of the High Court or any Circuit judge or Recorder, or (b) any qualifying judge advocate (within the meaning of the *Senior Courts Act 1981* (UK)) if the summons to attend for jury service is in the Crown Court: at s 9B(3), (4).

70 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020. Her Majesty's Courts and Tribunal Service is responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

71 *Juries Act 1974* (UK) s 9B(2).

72 *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196. This Act only applies to England and Wales.

73 Lord Justice Robin Auld, Ministry of Justice (UK), *Review of the Criminal Courts of England and Wales* (Report, September 2001) ch 5 [42] <<https://ials.sas.ac.uk/eagle-i/review-criminal-courts-england-and-wales-right-honourable-lord-justice-auld-september-2001>>.

10.44 Lord Justice Auld further noted that enabling people with disabilities to serve as jurors:

is not just a question of evaluating their disability and relating it to the task, but also of providing, where reasonably practicable, the facilities and/or assistance to them to undertake it. This includes fairly predictable needs, such as access for people with mobility difficulties to and, as necessary, throughout the court-building, space for jurors in wheelchairs in or near the jury box, special lavatories and suitable equipment for people with visual impairments.⁷⁴

10.45 Lord Justice Auld considered that:

all reasonable arrangements, coupled with suitable safeguards, should be provided to enable people with disabilities to sit as jurors with third party assistance. I say this, not because there is a general right, as distinct from duty, to undertake jury service or under any anti-discrimination legislation, but because such inclusiveness is a mark of a modern, civilised, society.⁷⁵

10.46 The Home Office has commented that, under the *Equality Act 2010* (UK), English, Welsh and Scottish 'public sector organisations must have due regard of the need to eliminate discrimination and to advance equality of opportunity, thereby ensuring that services are accessible to everyone, including by making reasonable adjustments when appropriate to do so'.⁷⁶ This involves, where reasonable, steps such as 'the removal of any barriers which place a disabled person at a disadvantage when compared to a non-disabled person and the provision of auxiliary services'.⁷⁷

There are some differences in jury legislation across the United Kingdom.⁷⁸ However the jury empanelment processes are broadly similar with respect to jurors in the subject groups. The process in England and Wales includes:⁷⁹

- asking people to provide information about what adjustments they might need
- adopting a flexible case-by-case approach to the provision of supports
- providing a range of adjustments, including BSL interpreters, hearing enhancements such as induction hearing loops, speech-to-text services, shorthand writers who transcribe the proceedings in court, allowing the juror to lip-read in the deliberating room, large print documents, Braille material, accommodations for guide dogs including arrangements to allow them to go into the courtroom and the jury room and being allowed exercise breaks, vision aids such as magnifiers, dedicated court ushers and the provision of additional breaks during the court process.
- offering pre-court visits to explore adjustments with the court
- using Braille cards.⁸⁰

Reforms to limit the 13th person rule in England and Wales

10.47 On 28 April 2022 legislation was enacted to allow BSL interpreters to work with deaf jurors in jury deliberations in England and Wales.⁸¹ The new legislation has amended the *Juries Act 1974* (UK) and 'will mean over 80,000 deaf people across England and Wales can now participate in jury service'.⁸²

⁷⁴ Ibid ch 5 [43].

⁷⁵ Ibid ch 5 [46].

⁷⁶ Home Office (UK), *Profoundly Deaf Jurors: Police, Crime, Sentencing and Courts Act 2022 Factsheet* (27 May 2022) <<https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-profoundly-deaf-jurors-factsheet#background>>.

⁷⁷ Ibid.

⁷⁸ See, eg, *Criminal Justice Act 1995* (Scot); *Criminal Procedure Act 1995* (Scot); *Juries Order 1996* (NI); *Juries Act 1974* (UK).

⁷⁹ Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020 and 2 September 2021.

⁸⁰ 'Law Change Opens Doors for Deaf Jurors in England and Wales', *Hearing Link* (Web Page, 17 March 2021) <<https://www.hearinglink.org/news/202103/law-change-opens-doors-for-deaf-jurors-in-england-and-wales/>>.

⁸¹ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196. This section of the amending legislation will come into force on 28 June 2022, pursuant to s 208(5)(x).

⁸² Ibid s 196; Ministry of Justice (UK), 'Law Change Opens Door to Deaf Jurors' (Press Release, 9 March 2021) <<https://www.gov.uk/government/news/law-change-opens-door-to-deaf-jurors>>.

- 10.48 Section 196 of the amending legislation requires the judge to determine whether the assistance of a BSL interpreter would enable a deaf person 'to be capable of acting effectively as a juror'.⁸³ If so, the judge may appoint one or more interpreters to provide that assistance. The BSL interpreter will then be permitted to 'remain with the jury in the course of their deliberations'.⁸⁴
- 10.49 Other key features of the new laws and procedures are:
- interpreters will be 'contractually bound to a confidentiality agreement, which will stipulate their obligation to always remain impartial and they will also be required to swear an oath or affirmation to that effect, alongside the existing interpreter's oath or affirmation'.⁸⁵
 - like jurors, the BSL interpreter's presence can be 'challenged for cause'.⁸⁶
 - like jurors, the BSL interpreter will need to surrender all electronic communication devices
 - existing offences for jurors relating to researching the case and sharing research with other jurors will apply to interpreters⁸⁷
 - the Act introduces a new indictable offence prohibiting 'interpreters interfering in or influencing jury deliberations'.⁸⁸
- 10.50 There was debate about whether to add 'or language and communication service professional' in addition to 'interpreter' in the new legislation.⁸⁹ Ultimately, the Act is limited to allowing a BSL interpreter into the jury room and does not extend to other support people.
- 10.51 The experience of all court users and particularly those with disabilities is being further improved by a £1 billion change programme to modernise and upgrade the courts and tribunals system.⁹⁰ Her Majesty's Courts and Tribunals Service (HMCTS) told us that the *Judicial Review and Courts Act 2022* (UK) aims to improve access to the criminal court system including through the digitisation of court procedures.⁹¹ It was noted that the number of people with disabilities 'who were recent internet users in 2020 reached almost 11 million, 81% of disabled adults'.⁹² HMCTS said steps would also be taken to address the needs of people with disabilities who could not use online services.⁹³

The experience of jurors in England

- 10.52 In August 2019, Matthew Johnston, a deaf man with lip-reading skills and the use of court stenographers, established a 'legal landmark' when he sat on the jury of three trials during a two-week period in the Crown Court. He was selected by the jury to be the foreperson. The trial proceeded smoothly and was 'in no way negatively impacted'.⁹⁴ *The Guardian* reported:

Johnston said: 'They wanted to see me, how deaf I was, how well I could lip-read, and when they met me there was no problem.'

⁸³ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196(2).

⁸⁴ *Ibid.*

⁸⁵ Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021.

⁸⁶ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196(3). Challenges for cause 'can be made by either the prosecution or defence and may either be a challenge to the whole panel of jurors (challenges to the array) or to an individual juror (challenges to the polls)'. Crown Prosecution Service, *Jury Vetting* (Guidelines, 10 July 2018). For further discussion of challenges, see Chapter 17.

⁸⁷ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196(3).

⁸⁸ *Ibid.* When this section comes into force on 28 June 2022, it will insert a new criminal offence - 's 201 Offence: interpreters interfering in or influencing jury deliberations' - into the *Juries Act 1974* (UK).

⁸⁹ United Kingdom, *Parliamentary Debates*, House of Commons, 17 June 2021 (Steve McCabe, Chair), vol 697, col 601.

⁹⁰ Ministry of Justice (UK), 'Law Change Opens Door to Deaf Jurors' (Press Release, 9 March 2021) <<https://www.gov.uk/government/news/law-change-opens-door-to-deaf-jurors>>.

⁹¹ Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021; *Judicial Review and Courts Act 2022* (UK).

⁹² 'Internet Users, UK: 2020', *Office of National Statistics* (UK) (Web Page) <<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2020>>.

⁹³ Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021.

⁹⁴ Howard Swains, 'Subtitles Help Deaf Juror Past "13th Stranger" Court Rules', *The Guardian* (online, 28 August 2019) <<https://www.theguardian.com/law/2019/aug/28/man-sets-legal-landmark-as-first-deaf-juror-in-english-court>>.

After being convinced of Johnston's ability to serve without hindrance, and discussions with a judge, the officials secured financing for a two-person team of stenographers to transcribe everything spoken in court, which Johnston read on a tablet device from the jury benches. ...

Anthony Jarvis, who was on the same jury panel at Blackfriars as Johnston, said: 'The processes in court seemed like they were in no way negatively impacted by having a deaf juror and that the court handled it very well. The trial carried on as if having a deaf juror was standard procedure. It didn't feel like this was the first time'.

Johnston himself said that apart from a couple of small teething issues—his tablet ran out of battery charge at one point, and he also could not hear the announcements in the jury assembly area calling him to court—his time was entirely fulfilling.

'It worked. It can be done,' he said. 'It means that more people with hearing impairments can go on a jury. You've got a bigger pool to select.'⁹⁵

Inclusive juries in New Zealand

Overall, there is a bespoke approach to the provision of supports. The juror will express their needs and the court will do its best to provide for those needs.⁹⁶

—Consultees from New Zealand courts

- 10.53 New Zealand Sign Language (NZSL) is an official language in New Zealand, pursuant to the *New Zealand Sign Language Act 2000* (NZ). Interpreters are required to be used in court where it is the preferred language of a party, witness, counsel or member of the court, and any other person with leave of the court.⁹⁷
- 10.54 In 2000, an amendment was made to the *Juries Act 1981* (NZ) to clarify that people with physical disabilities are eligible to serve on juries. The 13th person rule has not been amended by legislation;⁹⁸ it is a matter for a judge to decide whether a person's physical disability means that they cannot serve on a particular case, if there has not been any decision by a superior court on the issue.⁹⁹ Consultees from the High Court and District Courts of New Zealand told the Commission that the courts 'err on the side of assisting people with disabilities to serve and adopt a practical approach to the provision of supports'. Below we discuss some examples of people from the subject groups serving with supports in New Zealand.
- 10.55 The New Zealand jury summons asks people to contact the court registry if they need supports to serve.¹⁰⁰ Possible supports might include:
- a sign language interpreter
 - documents in other formats (such as Braille or bigger type) if jurors have a vision problem
 - use of an accessible courtroom if jurors have a mobility problem

⁹⁵ Ibid.

⁹⁶ Consultation 15 (Representatives of High Court and District Courts of New Zealand).

⁹⁷ The purpose of the Act is 'to promote and maintain the use of New Zealand Sign Language': *Sign Language Act 2006* (NZ) ss 3, 7(1). See also Hayley Reffell and Rachel Locker McKee, 'Motives and Outcomes of New Zealand Sign Language Legislation: A Comparative Study between New Zealand and Finland' (2009) 10(3) *Current Issues in Language Planning* 272, 283.

⁹⁸ Consultation 15 (Representatives of High Court and District Courts of New Zealand).

⁹⁹ Consultation 15 (Representatives of High Court and District Courts of New Zealand). Similarly, Scotland has not overcome the 13th person rule via legislation but has improved court services to provide reasonable adjustments including magnifiers and hearing loops, to allow jurors with disabilities to serve: see Scottish Courts and Tribunals Service, 'Making Jury Service More Accessible for Jurors', *SCTS News* (Web Page, 28 November 2019) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/11/28/making-jury-service-more-accessible-for-jurors>>.

¹⁰⁰ Ibid. The New Zealand Ministry of Justice website notes that 'If you have a disability, you can still serve on a jury. Contact the court ahead of time to discuss what support you might need to attend': 'Payment and Support to Help You Attend Jury Service', *New Zealand Ministry of Justice* (Web Page) <<https://www.justice.govt.nz/courts/jury-service/payment-and-support/#disability>>.

- being seated near the witness or judge or getting sound reinforcement if jurors have a hearing problem.¹⁰¹
- 10.56 While the prospective juror with disability can express their needs and 'the court will do its best to provide for those needs', the courts also told us that:
- For a juror, as opposed to a defendant or a witness (who must attend the trial), there are limits to the supports that it is reasonable for the court to provide.¹⁰²
- 10.57 A judge will make the decision about whether a trial is suitable for a juror with disability, either before the trial or on the day of trial. We were advised that 'Sometimes the decision about whether to include a person who has a vision or hearing loss takes place in what is effectively an in-chambers discussion between the judge, counsel and the potential juror, in a sensitive and practical manner'.¹⁰³
- 10.58 The *Juries Act 1981* (NZ) states that a judge may cancel the summons of a person if satisfied that, because of disability, the person is not capable of acting effectively as a juror.¹⁰⁴ This can occur on the judge's own motion or in response to an application by the Registrar or staff responsible for jury service. The application must be made before the jury is constituted, is heard in private, and conducted at the discretion of the judge.¹⁰⁵

The experience of jurors in New Zealand

- 10.59 We were told by consultees from the High Court and District Court of New Zealand that there have been some examples of jurors from the subject groups serving on juries in the District Court. It was noted that:
- Jurors who are blind/have low vision are quite rare; however, jurors who are deaf/have hearing loss have been encountered reasonably regularly in the District Courts.¹⁰⁶
- 10.60 In 2005, Dr David McKee, a deaf studies teacher at Victoria University in Wellington, received a summons to serve as a juror in the Wellington District Court. His service was facilitated by two interpreters and the trial proceeded smoothly. He was elected by his fellow jurors as the foreperson in a tax trial. He commented that it 'went really smoothly ... I felt like I was able to do my duty as a citizen'.¹⁰⁷
- 10.61 We were also told by consultees from the New Zealand courts about a case in which a blind juror served in a District Court matter in 2000:
- The blind juror contacted the registry to let them know she had a disability. She had a sight assistance dog, who sat with her in the courtroom. The judge appraised her ability to serve prior to empanelment, and counsel were notified of the blind juror's presence in the jury prior to commencement of the trial. The nature of trial was that oral evidence was the primary evidence adduced, so there was no impediment for a blind juror to serve. The juror was assigned a court attendant to assist her to navigate the court. At the end of the trial, the jury were asked to discuss whether they perceived there were any issues with having the blind juror serve and no concerns were raised. It was observed that over the course of that trial, the jurors became a very self-sufficient group. They took it upon themselves to lead the blind juror out of the jury box and read out documents to her if necessary. The juror's dog sat near the jury box and was taken out for relief breaks as often as needed. The juror did not rely on any technological supports or any other supports. The trial did not run overtime at all and proceeded smoothly.¹⁰⁸

101 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 31 [4.25], citing Ministry of Justice (NZ), 'Disability Support', *Jury Service* (Web Page, 18 August 2020) <<https://www.justice.govt.nz/courts/jury-service/disability-support/>>. We note that these examples were included on the Ministry of Justice website when we produced the consultation paper. The link is no longer active.

102 Consultation 15 (Representatives of High Court and District Courts of New Zealand).

103 Ibid.

104 *Juries Act 1981* (NZ) s 16AA(1).

105 Ibid s 16AA(1), (3), (4).

106 Consultation 15 (Representatives of High Court and District Courts of New Zealand).

107 Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Blocks Australian Gale Lyons' Bid', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us,-nz/7905810>>; 'First Deaf Person to Serve on Jury', *All Deaf* (Web Page, 11 March 2005) <<https://www.alldeaf.com/threads/first-deaf-person-to-serve-on-jury.21651/>>.

108 Consultation 15 (Representatives of High Court and District Courts of New Zealand).

Inclusive juries in Ireland

- 10.62 Historically, legislation has prevented people from serving on juries with adjustments in Ireland. In 2008, change to the *Juries Act 1976* (Ireland) removed the explicit reference to people who are deaf as ineligible to serve as jurors. The law now excludes a person with an 'enduring impairment' if it is not 'practicable for them to perform the duties of a juror'.¹⁰⁹
- 10.63 In 2010, legal challenges were brought by three people who were deaf and hard of hearing—Ms Clarke, Mr Owens and Mr Dunne—who were excused from jury service because they required interpreters to serve.¹¹⁰ The High Court upheld the 13th person rule in Clarke and Owens' cases.¹¹¹
- 10.64 In Dunne's case, by contrast, the High Court suggested that it was practicable for a deaf juror to serve with an interpreter and technological supports.¹¹² Justice Carney considered that the 13th person rule could be addressed by:
- an appropriate oath being taken by the signer in which he would submit himself to the same obligations of confidentiality as the rest of the other jurors.¹¹³
- 10.65 Dunne did not serve as a juror, despite Justice Carney's willingness to provide adjustments, as he was subject to a peremptory challenge and removed from the jury panel.¹¹⁴
- 10.66 Following the judgement about Mr Dunne's ability to serve, the Irish Law Reform Commission (LCRC) released a report recommending further research into 'permissible and practicable supports and accommodation for [jurors with physical disabilities], based on international best practice and experience'.¹¹⁵

The experience of jurors in Ireland

- 10.67 While legislation still has not been enacted to limit the application of 13th person rule or oblige the courts to provide supports, the Irish Court Service has developed processes to enable deaf jurors to serve, including by providing Irish Sign Language interpreters (see example below).¹¹⁶ The Irish Courts Service has a dedicated disability liaison officer and takes a flexible and individualised approach to providing reasonable accommodations for people with disabilities.¹¹⁷
- 10.68 The first deaf juror was empanelled in Ireland in December 2017 in the Dublin Circuit Criminal Court.¹¹⁸ While that case did not go to trial, presiding Judge Sinéad Ní Chúlacháin noted that it was a 'historic jury'.¹¹⁹ In the same week that the first deaf juror was empanelled, the Oireachtas (the National Parliament) enacted legislation recognising Irish Sign Language (ISL) as an official language of Ireland.¹²⁰
- 10.69 In September 2020, Patricia Heffernan became the first deaf person to deliberate on an Irish jury. ISL is her first language; English is her second language. She was assisted in the deliberation by three ISL interpreters: two to interpret in the court and jury deliberations, and one to interpret during breaks. Ms Heffernan said there were 'absolutely no issues around communication'. While there was terminology she was not

109 Changes were made to the *Juries Act 1976* (Ireland) sch 1, pt 1 by the *Courts and Civil Law (Miscellaneous Provisions) Act 2008* (Ireland) s 64(a). See also Law Reform Commission (Ireland), *Jury Service* (Report No 107, April 2013) [4.03]–[4.05]; 'Who Can Be Called for Jury Service?', *The Courts Service of Ireland* (Web Page) <<https://www.courts.ie/who-can-be-called-jury-service>>.

110 *Clarke v County Registrar County Galway* [2010] 2006 High Court Judicial Review 1338; *The People (DPP) v O'Brien*, Central Criminal Court, 29 November 2010; *The People (DPP) v JM*, Circuit Criminal Court, November 2010.

111 See Law Reform Commission (Ireland), *Jury Service* (Report No 107, April 2013) [4.11]–[4.12].

112 *Ibid* [4.13]–[4.14], citing *The People (DPP) v O'Brien*, Central Criminal Court, 29 November 2010.

113 Law Reform Commission (Ireland), *Jury Service* (Report No 107, April 2013) [4.13].

114 *Ibid* [4.14]. See our discussion of this issue in Chapter 17.

115 *Ibid* [4.44].

116 Mary Carolan, 'Jury Service: Many with Disability "Would like to Do Their Civic Duty"', *The Irish Times* (online, 4 February 2019) <<https://www.irishtimes.com/news/crime-and-law/jury-service-many-with-disability-would-like-to-do-their-civic-duty-1.3780755>>.

117 *Ibid*.

118 Mary Carolan, "Historic" Day as First Deaf Juror Serves on Jury', *The Irish Times* (online, 18 December 2017) <<https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/historic-day-as-first-deaf-juror-serves-on-jury-1.3331199>>.

119 *Ibid*.

120 *Irish Sign Language Act 2017* (Ireland). See also Michael Farrell, 'Ireland Gets First Ever Deaf Juror—11 Years after First Attempt', *PILA Bulletin* (20 December 2017) <<https://www.pila.ie/resources/bulletin/2017/12/20/guest-piece-by-michael-farrell-ireland-gets-first-ever-deaf-juror-11-years-after-first-attempt/>>.

familiar with, such as 'reasonable doubt', she reported that the interpreters were 'really good about explaining it'.¹²¹

- 10.70 According to a media report, 'Judge Sinéad Ní Chúlacháin had to occasionally tell the parties not to talk over each other for the sake of the interpreters'. However, this 'had the effect of making proceedings easier to follow for everybody involved, not just Heffernan'. It was further reported that:

In the beginning the other jurors felt 'a bit awkward' as they got used to talking to Heffernan through an interpreter. 'But it became so natural. After a bit we were cracking jokes and having fun.'

One of her interpreters, O'Connell, said at first she was nervous about the deliberations, despite having 15 years' experience as an ISL interpreter. 'After hearing all the specifics of the trial, to be silent during the deliberations was very difficult.'

[Heffernan commented:] 'The deaf community need to know we're all well able to do whatever everybody else is doing in society. We're all equal. The only thing is we have a different language'.¹²²

- 10.71 Judge Ní Chulachain has compared the exclusion of deaf jurors to the exclusion of women from juries, which did not end until the 1970s. Her Honour commented: 'I hope that in years to come the idea that a deaf person couldn't be a juror will be considered as odd as the idea that a woman can't'.¹²³

Victoria is lagging behind other jurisdictions

- 10.72 The examples cited in this chapter demonstrate that barriers to jury service for people in the subject groups have been successfully removed in other jurisdictions. The concerns that have been put forward in Australia regarding the 13th person rule, fair trial concerns, practical difficulties and costs (discussed in Chapters 6 and 9) have all been addressed successfully. In the second half of this report (Chapters 11–19), we describe the reform steps that should be taken in Victoria, drawing on the examples of good practice above.

121 Conor Gallagher, 'Galway Woman Makes History as First Deaf Person to Deliberate on Irish Jury', *The Irish Times* (online, 5 October 2020) <<https://www.irishtimes.com/news/crime-and-law/galway-woman-makes-history-as-first-deaf-person-to-deliberate-on-irish-jury-1.4370644>>.

122 Ibid.

123 Public Interest Law Alliance, 'First Deaf Person to Sit on a Jury and Deliberate on Verdict', *PILA Bulletin* (14 October 2020) <<https://www.pila.ie/resources/bulletin/2020/10/14/first-deaf-person-to-sit-on-a-jury-and-deliberate-on-verdict/>>.

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11. Reforming the Juries Act to enable inclusive juries

We strongly believe that amending the Act to include specific obligations to consider providing reasonable supports is the only way that people who are blind or with low vision will ever be given the realistic opportunity to serve on a jury in Victoria.¹ —Vision Australia

Overview

- The first step to improve inclusivity on Victorian juries is to change the *Juries Act 2000* (Vic) (the Act).
- The Act should require the courts to direct that reasonable adjustments be provided where the court considers that they would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror.
- The Act should outline what factors the court may consider in deciding whether it is reasonable to provide adjustments.
- The Act should limit the operation of the 13th person rule.

Legislative change is needed

- 11.1 The *Juries Act 2000* (Vic) (the Act) needs to be changed to ensure that reasonable adjustments are provided to people in the subject groups.
- 11.2 Changing the Act will respond to the recommendations of the United Nations Committee on the Rights of Persons with Disabilities (the Convention Committee), which has called on Australia to make the necessary amendments to laws to remove barriers to jury service. It will improve compliance with the Convention on the Rights of Persons with Disabilities (CRPD) in Victoria.² Vision Australia highlighted the importance of legislative change:

Experience in Australia and overseas has consistently shown that lasting progress in the promotion and protection of the rights of people with a disability is only achieved when it is required or supported by legislation. In Australia this is clear when reviewing the impact of the *Disability Discrimination Act 1992* (the DDA), and the three Disability Standards that have developed under the provisions of the DDA. In the US, the accessible public ICT [Information and Communication Technologies] procurement requirements of the Rehabilitation Act have been pivotal in improving the accessibility

¹ Submission 10 (Vision Australia).

² Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [8] (*JH v Australia*). Identical recommendations were made in: Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) (*Lockrey v Australia*); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) (*Beasley v Australia*). See detailed discussion in Chapter 6.

of a wide range of technologies and have even been identified as the catalyst for companies such as Netflix to introduce audio description to their content.

There are some areas where voluntary codes or agreements have helped deliver positive change for people with a disability, but in our view, and having regard to the slow-changing nature of the legal system and the legal profession, jury service for people who are blind or have low vision is not one of these areas.³

11.3 Juries Victoria and the courts operate separately in Victoria. Therefore, legislation needs to drive change to ensure a coordinated response. The County Court submission acknowledged that reform will 'require extensive cooperation between Juries Victoria and the courts'.⁴ Participants in our consultation with Deaf Victoria pointed out that it will also be important for the courts and Juries Victoria to develop 'a good partnership with service providers' to deliver reforms.⁵

11.4 Legislative change will:

- ensure that people in the subject groups have the same opportunity to participate on Victorian juries as others in our community
- elevate the rights of those in the subject groups and articulate the responsibilities of interpreters and support persons
- help to allay the legal profession's concerns by providing a clear legal framework for change
- provide a trigger for disability awareness and professional development training about adjustments.

The legislative approach in the Australian Capital Territory and England and Wales

Australian Capital Territory

11.5 In Chapter 10 we identified that the Australian Capital Territory (ACT) has a new legislative obligation regarding the provision of reasonable supports. We noted that those changes apply to a broader group of people than those in the subject groups.

11.6 The relevant provision is set out below.

Section 16 of the *Juries Act 1967* (ACT): Reasonable support because of insufficient understanding or disability

- (1) This section applies if a judge is satisfied that a person summoned or appointed to attend to serve as a juror, and who has not claimed an exemption or otherwise been excused from attendance, may be unable to properly discharge the duties of a juror, because the person—
 - (a) has an insufficient understanding of the English language; or
 - (b) is suffering from a mental or physical disability.
- (2) The judge—
 - (a) must consider if support that would enable the person to properly discharge the duties of a juror can reasonably be given; and
 - (b) if satisfied that support that would enable the person to properly discharge the duties of a juror can reasonably be given, must make a direction that the support be given.

3 Submission 10 (Vision Australia).

4 Submission 14 (County Court of Victoria).

5 Consultation 6 (Deaf Victoria and community participants).

Examples—support

- 1 an interpreter, including an Auslan interpreter
- 2 an assistance animal, disability aid or support person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) To determine if support can reasonably be given, the judge may consider the following:
 - (a) whether the support would impose a disproportionate or undue burden on court resources, facilities and time frames;
 - (b) if the support would require a non-juror being present during jury deliberations, whether the non-juror's presence would inhibit or restrict discussion, or unduly pressure or influence any juror;
 - (c) any other issue the judge considers relevant.
- (4) If the judge makes a direction allowing an interpreter or support person to assist the person to properly discharge the duties of a juror—
 - (a) the common law rule against having a non-juror in the jury room is not a relevant consideration; and
 - (b) a direction to allow a non-juror to be present during jury deliberations is solely for assisting the person to properly discharge the duties of a juror; and
 - (c) the direction is subject to the interpreter or support person agreeing to make an oath or affirmation in accordance with schedule 1, part 1.1A or part 1.1B.
- (5) If the judge is not satisfied that support that would enable the person to properly discharge the duties of a juror can reasonably be given, the judge may discharge that person from further attendance on the Supreme Court under that summons or appointment.

The approach in England and Wales

- 11.7 The *Juries Act 1974* (UK) (only in operation in England and Wales) is silent about the provision of adjustments. However, it gives the judge the power to make decisions on the issue of capacity. The law presumes that a person should serve unless the judge thinks that they cannot act effectively as a juror because of their disability.⁶ The relevant provision is set out below.

Section 9B—Discharge of summonses to disabled persons only if incapable of acting effectively as a juror.

- (1) Where it appears to the appropriate officer, in the case of a person attending in pursuance of a summons under this Act, that on account of physical disability there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge.
- (2) The judge shall determine whether or not the person should act as a juror; but he shall affirm the summons unless he is of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror, in which case he shall discharge the summons.

- 11.8 In Chapter 10 we discussed the new legislation which allows British Sign Language (BSL) interpreters to enter jury rooms in England and Wales.⁷ This amends the *Juries Act 1974* (UK) so that, for the purposes of section 9B(2) (see above), 'the judge must consider whether the assistance of a British Sign Language interpreter would enable a deaf person to be capable of acting effectively as a juror'.⁸ If so, the judge may appoint one or more interpreters to provide that assistance and affirm the summons. The interpreter must not interfere in or influence the deliberations of the jury.⁹ This new law means that the 13th person rule does not apply to BSL interpreters, but it continues to apply to other non-jurors.

How should the Juries Act be amended?

A new obligation on the courts to provide reasonable adjustments

- 11.9 The Act should be amended to require that where a judge considers that reasonable adjustments would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror, the judge must direct that those adjustments be provided or that the Juries Commissioner provide them.
- 11.10 The community responses that we received supported a new legislative obligation.¹⁰ Juries Victoria 'supports a default approach by the courts towards the provision of reasonable supports for people in the subject groups'.¹¹ The Supreme Court 'does not see any issues in principle with requiring courts to consider the provision of reasonable supports for people in the subject groups'.¹²
- 11.11 There was general support for a legislative obligation modelled on section 16 of the *Juries Act 1967* (ACT) (the ACT Act).¹³ Victorian Criminal Bar Association consultees noted:
- The ACT legislation appears to work well as it allows a potential juror to serve with supports, obliges the court to provide supports but also provides the judge with the last word about what is appropriate in the particular circumstances of the trial. This approach seems comprehensive and reasonable.¹⁴
- 11.12 Some submissions argued that the legislation should make it clear that the default position should go beyond mere 'consideration' and state that reasonable adjustments are to be provided. For example, Associate Professors Dr Bruce Baer Arnold and Wendy Bonython submitted that 'the history of discrimination law in Australia and elsewhere regrettably indicates that "consideration" is often merely formalistic'.¹⁵

Fair trial considerations

- 11.13 It will be important for a judge to consider whether adjustments will enable the person to perform the role of juror, because this relates to the accused's right to a fair trial (see Chapter 9). Depending on the nature of a particular trial, a person in the subject groups may not be able to evaluate certain evidence that is material in that trial, even with reasonable adjustments.¹⁶

7 *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196. This section of the amending legislation will come into force on 28 June 2022, pursuant to s 208(5)(x).

8 *Ibid* s 196(2).

9 *Ibid* s 196(2) and (3).

10 Position Statement 1 (Blind Citizens Australia); Submissions 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)), 7 (Law Institute of Victoria), 9 (Madison), 10 (Vision Australia); Consultations 4 (Victorian Criminal Bar Association), 8 (Brent Phillips).

11 Submission 13 (Juries Victoria).

12 Submission 11 (Supreme Court of Victoria).

13 Consultations 2 (Law Institute of Victoria), 8 (Brent Phillips), 6 (Deaf Victoria and community participants, 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)), 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)), 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity); Submission 4 (Baer Arnold & Bonython).

14 Consultation 4 (Victorian Criminal Bar Association).

15 Submission 4 (Baer Arnold & Bonython).

16 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 5 [3.8].

- 11.14 The judge should consider the interaction between the particular person and the issues in the trial in order to determine whether reasonable adjustments would allow the juror to perform jury service in that trial. This was the approach recommended by the Convention Committee.¹⁷
- 11.15 The *Criminal Procedure Act 2009* (Vic) requires extensive information to be disclosed pre-trial. The Commission's view is that there should be enough information available in most cases for a judge to make an assessment about adjustments at an early stage.
- 11.16 If it is clear to the trial judge at the outset of the empanelment process that a person is not able to comprehend evidence that is material to the outcome of a trial, that person should not be able to serve on that trial. An example would be a case that turns on voice identification evidence which a deaf person would be unable to hear.
- 11.17 The question of whether a potential juror should serve if they cannot comprehend certain evidence that is *not* material to the outcome of a trial should be a decision of the trial judge, based on all the circumstances.
- 11.18 If during the trial it becomes clear that a person cannot comprehend evidence even with the use of reasonable adjustments, the judge should make a determination about whether to allow the juror to continue to serve. That decision may be challenged on appeal to the Court of Appeal. If the judge decides that the juror should not continue to serve, they may discharge the juror pursuant to existing powers under section 43 of the Act. Defence counsel may have an opinion about this but their involvement in this decision-making process is a matter for the trial judge to determine.
- 11.19 The Commission does not recommend that the Act should include examples of possible scenarios that might prevent a person from serving. There are too many variables: everyone's disability is different, as is the evidence presented in each trial, and its relevance for that trial. The types of adjustments available are constantly changing and evolving.

The 13th person rule should be limited

- 11.20 In Chapter 4 we described the operation of the common law rule prohibiting non-jurors in the jury room (the 13th person rule). The aim of this rule is to keep the jury separate to maintain confidentiality of the deliberation process. This rule should be limited in the Act to enable people to serve with reasonable adjustments. The ACT Act provides a simple model for doing this in section 16(4) (above).
- 11.21 Safeguards are needed to ensure that legislation remains in step with the underlying purpose of the 13th person rule and to address the High Court judgment in *Lyons v State of Queensland*.¹⁸ The High Court pointed to the absence of provisions in the Queensland legislation to administer an oath to an interpreter and to maintain confidentiality.¹⁹ In Chapters 14 and 15 we make recommendations regarding the roles and responsibilities of interpreters and support persons. Our recommendations for the provision of an oath and penalties for breaches of duties are designed to maintain confidentiality of jury deliberations and uphold the underlying principles of the 13th person rule.
- 11.22 Community responses supported changing the Act to limit the 13th person rule. Alastair McEwin referred to a mischaracterisation of the role of an interpreter as a 13th person in the jury room. Auslan interpreters 'are only there to facilitate communication, not to participate in the conversation/debate'.²⁰
- 11.23 The County Court stated that it 'does not view the 13th person rule as an impediment to jury deliberations in relation to an assistance person being present purely to assist a person who requires it' and suggested changes 'similar to that undertaken in the Australian Capital Territory would be needed to enable a non-jury member to be present in the deliberation room'.²¹

¹⁷ *JH v Australia* [7.8]. See also *Beasley v Australia* [9]; *Lockrey v Australia* [9].

¹⁸ *Lyons v State of Queensland* [2016] HCA 38, (2016) 259 CLR 518, [33]–[38].

¹⁹ *Ibid* [35], [36].

²⁰ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

²¹ Submission 14 (County Court of Victoria).

- 11.24 Vision Australia noted that 'without a legislated modification of the "13th person" rule, there will be situations where a juror who is blind or has low vision will be needlessly precluded from carrying out their duties as a juror'.²²
- 11.25 Auslan service providers and regulatory bodies supported reform, noting that an interpreter who works in court must already comply with professional standards and a code of ethics, which includes an obligation to maintain confidentiality.²³

A judge should make the final decision about the use of reasonable adjustments

- 11.26 As the Supreme Court noted in submissions, trial judges have an 'overriding duty to ensure a fair trial'.²⁴ It is the role of the trial judge to ensure that every aspect of the trial is conducted fairly and according to law. Section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a 'competent, independent and impartial court or tribunal after a fair and public hearing'.²⁵
- 11.27 The Supreme Court has described section 24(1) as follows:
- The right to a fair hearing is concerned with the procedural fairness of a decision. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent. This principle is commonly known as the principle of equality of arms.²⁶
- 11.28 Most submissions supported the idea that the judge should make the final determination about whether a person can serve on a jury with reasonable adjustments.²⁷ This is the approach in the ACT and in England and Wales.
- 11.29 However, Brent Phillips, Vision Australia, Expression Australia and Madison noted their concerns that judges may have negative views of people in the subject groups.²⁸ Expression Australia stated:
- While it is good optics to mandate in legislation that deaf people should be allowed to participate in juries, in the end it comes down to a judge's understanding/evaluation of whether the person can take part or not. It will be important that judges have a good understanding of what supports are available to allow a deaf person to serve, before the judge decides whether or not to exclude them from jury service.²⁹
- 11.30 The submission from Madison noted that a 'judge could be old fashioned or traditional and may be biased which could negatively affect how they see the prospective juror'. She suggested that the sheriff would 'act more impartially' and would listen to the views of the prospective juror in a way that was less intimidating than a judge so that they felt that they were being taken seriously.³⁰
- 11.31 Vision Australia stressed the importance of professional disability awareness training to counter 'poor decisions based on a lack of understanding about the benefits of reasonable supports and prejudicial attitudes'.³¹ In Chapter 18 we make recommendations about disability awareness training for the legal profession that

22 Submission 10 (Vision Australia).

23 Consultations 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)).

24 Submission 11 (Supreme Court of Victoria), citing *Haddara v The Queen* [2014] VSCA 100, (2014) 43 VR 53 [16]; *James v The Queen* [2014] HCA 6, (2014) 253 CLR 475, [38]. See also Judicial College of Victoria, '6 Role of the Judge', *Victorian Criminal Proceedings Manual* (Online Manual, 1 March 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

26 *Knight v Wise* [2014] VSC 76 [36]. For further discussion of the scope of this right and relevant case law: see Judicial College of Victoria, '6.18.2 Scope of the Right', *Charter of Human Rights Bench Book* (Online Manual, 1 September 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

27 Submissions 4 (Baer Arnold & Bonython), 7 (Law Institute of Victoria), 10 (Vision Australia), 11 (Supreme Court of Victoria); Consultation 16 (Office of Public Prosecutions Victoria).

28 Consultations 5 (Expression Australia), 8 (Brent Phillips); Submissions 9 (Madison), 10 (Vision Australia).

29 Consultation 5 (Expression Australia).

30 Submission 9 (Madison). This submission proposed that this assessment should not be made by a judge alone but by a 'colloquium consisting of the Sheriff, jury commissioner and the trial judge'.

31 Vision Australia and Brent Phillips also stressed the importance of judicial training: Submission 10 (Vision Australia); Consultation 8 (Brent Phillips).

includes information about the range and operation of adjustments, to guard against judges applying 'too strict a judgement on whether a deaf juror can serve at the outset'.³²

- 11.32 Ultimately, as Vision Australia identified, 'the trial judge has the responsibility for conducting the trial, and so is best placed to make decisions that take all the circumstances of the case into account'.³³ The Law Institute of Victoria submitted:

The decision of the Juries Commissioner would be an administrative decision as to the potential juror's eligibility and requirements to participate, after which the juror's eligibility, regardless of the Juries Commissioner's findings, should rest with the Judge who is best positioned to make an assessment and consider the submissions from parties on this matter. The Judge is best positioned to oversee a fair trial occurs, possessing wide powers to control the conduct of proceedings and is best placed to assess the specific circumstance of the trial against whether the individual is unable to discharge the duties of a juror.³⁴

- 11.33 Victoria Legal Aid (VLA) argued that having a trial judge make the final decision will 'mitigate the risk that an entire jury would need to be discharged and a new trial commenced, and the risk of a miscarriage of justice where visual or aural evidence cannot be properly scrutinised or assessed provided by a juror'.³⁵
- 11.34 The reforms discussed in Chapter 12 contemplate that Juries Victoria will coordinate and plan how the adjustments are provided. Juries Victoria will talk to the potential juror about their needs, arrange a pre-emplanelment court visit, and consult with the court about providing adjustments. A judge's decision will be based on information and a recommendation provided by the Juries Commissioner.

The operation of Schedule 2 should be limited

- 11.35 If a judge makes a direction to provide reasonable adjustments, the Act should provide that the ineligibility criteria in schedule 2(3)(a) of the Act (a person with a physical disability that renders them incapable of performing the duties of jury service) will not apply.
- 11.36 In Chapter 14 we also recommend a limitation to schedule 2(3)(f) regarding English communication and Auslan interpreting.

We recommend modifications to the ACT approach for Victoria

- 11.37 The ACT Act provides a helpful model upon which to base the Victorian reforms. We are recommending some modifications to the ACT model based upon our consultations and research.

Improving language

- 11.38 Vision Australia was critical of the wording in section 16(1)(b) of the ACT Act, which describes a potential juror who 'is suffering from a mental or physical disability':

Having examined the ACT approach, we feel that it is appropriate for Victoria, recognising, of course, that there may need to be customisations made to the wording and examples in the ACT legislation. We strongly recommend that if the ACT approach is adopted in Victoria, it is expressed in language that reflects current views of disability (so, for example, words like 'suffer' are not appropriate) and that the illustrative material provided in the legislation is more diverse.³⁶

32 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).
33 Submission 10 (Vision Australia).
34 Submission 7 (Law Institute of Victoria).
35 Submission 8 (Victoria Legal Aid).
36 Submission 10 (Vision Australia).

- 11.39 For the reasons expressed by Vision Australia, the Commission agrees that the Act should not make reference to a person 'suffering from a physical disability'. A form of alternative wording could be: 'because the person is deaf, hard of hearing, blind or has low vision'. Disability advocacy organisations should be consulted in determining the wording of the new provisions.³⁷

Including more examples of adjustments

- 11.40 The ACT Act lists the following as examples of supports, noting that the list is not exhaustive:
- 1) an interpreter, including an Auslan interpreter
 - 2) an assistance animal, disability aid or support person.³⁸
- 11.41 The Victorian Act should also provide examples of adjustments. Some community responses suggested that the list of examples of supports in section 16(2) of the ACT Act should be expanded for the Victorian context.
- 11.42 Vision Australia suggested that 'where the legal profession has very little experience of blind people, the more examples that can be provided, then the more options they will consider. A non-exhaustive list ... would leave the door open to adapt to new technologies'.³⁹ Vision Australia also considered 'it is important to be able to modify and expand the amount of illustrative material to ensure that it is accurate and current'. For this reason, 'it may be preferable to include it in a Regulation or other complementary material to the legislation itself'.⁴⁰
- 11.43 Examples of adjustments are not included in the *Juries Act 1974* (UK) for England and Wales. However, a British Sign Language interpreter is specifically included in the new legislative provision.⁴¹ In New Zealand, examples are not provided in legislation, but people are encouraged to contact the court to discuss their needs. In the United States, the *Americans with Disabilities Act* (ADA) lists examples of aids that should be provided to ensure effective communication with people with disabilities.⁴² In Chapter 10, we noted the long list of accommodations on the New York State Court website.⁴³
- 11.44 The Commission agrees that more examples of possible adjustments should be included in the Act that can be added to by regulation. We are persuaded that this will assist the courts and Juries Victoria to turn their minds to possible adjustment options early in the selection process. The list of non-exhaustive examples in the Act should be expanded to include 'technological aids that facilitate communication, for example, with speech-to-text software or screen reading technology'. It may also be helpful to provide an example of a disability aid such as a magnifier.
- 11.45 It will be important for Juries Victoria to be proactive about maintaining engagement with peak disability advocacy organisations to discuss emerging technology and available adjustments. In England and Wales, courts monitor developments in potential new technological supports.⁴⁴ Juries Victoria is best placed to do so in Victoria. Juries Victoria and the courts should advise the Victorian Government when new examples should be added to regulation.

³⁷ *JH v Australia* [8]. Identical recommendations were made in the cases of *Beasley v Australia* and *Lockrey v Australia*.

³⁸ See examples listed in *Juries Act 1967* (ACT) s 16(2).

³⁹ Consultation 7 (Vision Australia).

⁴⁰ Submission 10 (Vision Australia).

⁴¹ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196.

⁴² *Americans with Disabilities Act*, 42 USC (1990). See also Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 34–5 [4.38]; Department of Justice (US), *The Americans with Disabilities Act: Title II Technical Assistance Manual* (Manual) <<https://www.ada.gov/taman2.html>>; Office of Court Administration, New York State Unified Court System, 'Reasonable Accommodations for Court Users', *NYCOURTS.GOV* (Web Page) <http://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml>.

⁴³ Office of Court Administration, New York State Unified Court System, 'Reasonable Accommodations for Court Users', *NYCOURTS.GOV* (Web Page) <http://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml>.

⁴⁴ Ministry of Justice (UK), 'Law Change Opens Door to Deaf Jurors' (Press Release, 9 March 2021) <<https://www.gov.uk/government/news/law-change-opens-door-to-deaf-jurors>>.

Refining the list of factors to be considered by a judge

- 11.46 Section 16(3) of the ACT Act lists three factors the judge may consider in determining if support can reasonably be provided:
- the impact on the trial and court resources
 - the impact on the jury deliberation process
 - any other issue that the judge thinks is relevant.
- 11.47 The Commission asked in the consultation paper whether the ACT list was satisfactory or needed to be modified in any way. Most responses supported the factors outlined in the ACT provision.⁴⁵ Vision Australia noted that it would like to see as much certainty as possible in the legislation.⁴⁶ The Supreme Court noted that 'there are broader considerations and that the categories are not closed'.⁴⁷
- 11.48 The Supreme Court submission identified three categories of reasons that might prevent a person in the subject groups from serving on a jury:
- a) *Reasons pertaining to the trial*—for example, the evidence likely to be presented
 - b) *Reasons pertaining to availability of adjustments*—for example, if adjustments cannot be arranged at short notice
 - c) *Reasons pertaining to the court*—for example, whether the courtroom can safely accommodate the juror.⁴⁸

Considerations—the provision of adjustments

Court resources and costs

- 11.49 Some concerns were raised about the consideration of court resources and costs. Vision Australia emphasised that the burden should be 'weighed against the benefits, including broader policy benefits' and that some cost is inevitable but justified.⁴⁹ Similarly, Daniel Stubbs did not want to see resourcing being used as an excuse for 'I couldn't be bothered in my courtroom'.⁵⁰ Instead, he argued that:
- In the calculation of 'reasonableness', the government and the courts should not give too much weight to the economic cost of providing supports. Given the small number of people involved this reform is not likely to have a big impact on the whole scheme of running a court.⁵¹
- 11.50 The ACT Act states that the judge may consider whether 'the support would impose a disproportionate or undue burden on court resources, facilities and time-lines'.⁵² The Commission thinks that this wording guards against judges simply opting out without good reason. In Chapter 19 we recommend that the Supreme Court include in its annual report a summary of the number of people for whom adjustments could not be reasonably provided and the reasons given. This will encourage judges to give proper consideration to enabling people in the subject groups to serve. Not many people will need an Auslan interpreter or a CART stenographer to serve. The courts should be funded to provide these adjustments as the need arises.
- 11.51 An overarching purpose of the Act is to make juries more representative of the community.⁵³ If new laws are introduced, it will be important for the amending Act to set out that the aim of the new provisions is to meet this overarching purpose by enabling people from the subject groups to serve with reasonable adjustments. This will serve to guide the second reading speech and interpretation of the new provisions, including considerations of court resources and costs.

45 For example, Submissions 4 (Baer Arnold & Bonython), 9 (Madison), 11 (Supreme Court of Victoria), 14 (County Court of Victoria).
46 Submission 10 (Vision Australia).
47 Submission 11 (Supreme Court of Victoria).
48 Ibid.
49 Submission 10 (Vision Australia).
50 Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).
51 Ibid.
52 *Juries Act 1967* (ACT) s 16(3)(a).
53 *Juries Act 2000* (Vic) s 1(b).

Practical challenges

- 11.52 Several responses referred to the practical challenges of providing adjustments. The Office of Public Prosecutions (OPP) referred to:
- Geographical considerations, including the availability of supports in regional areas, and the smaller pools of Auslan interpreters available in regional areas. Are there enough interpreters to support the regional courts as well as Melbourne?
- 11.53 The OPP observed that finding supports for one witness for a few hours is very different from finding ongoing supports for a juror for many days, weeks or even months:
- If someone requires more than one type of support, can multiple supports be used? How far does 'reasonable' extend? Interpreter availability might be an issue if a trial goes beyond 5 days. Thought is needed about the logistics of how supports could be provided in this context.⁵⁴
- 11.54 Juries Victoria noted that it is easier to provide adjustments in some jury districts than others:
- It is integral to the success of more inclusive juries that all supports that can be reasonably provided are offered to those who need them. However, what can be 'reasonably' provided will vary according to circumstances and facilities. There are 12 operational jury districts at the time of writing, with each presenting different circumstances that may affect the provision of various supports. This inconsistency is unfortunate, and as any efforts to resolve it would sit outside JV's area of responsibility, it is not our place to speculate on how these efforts may be undertaken.⁵⁵
- 11.55 The factors outlined in the ACT Act are sufficient to encompass the additional issues raised by the OPP and Juries Victoria. The Commission does not think that it is helpful to be overly prescriptive regarding decision-making factors in the Act. Instead, the legislation should be broad enough to allow the judge to exercise their discretion, keeping in mind the overarching purpose of the Act to improve the representativeness of Victorian juries.
- 11.56 We acknowledge that sometimes, despite best efforts, adjustments may not be able to be arranged in time, for example, because of a shortage of Auslan interpreters. It may be more difficult to source Auslan interpreters in regional areas.⁵⁶ As consultees from the Victorian Criminal Bar Association pointed out, timelines might be less predictable in regional areas, and shorter circuit times might make it more difficult to arrange adjustments quickly. The regional courts are very different in terms of accessibility and case load, so the provision of adjustments should be considered on a case-by-case basis.⁵⁷ These factors should be considered by a judge and balanced with the overarching need for greater representativeness outlined in the purpose of the Act.⁵⁸

A new 'own motion' power for the Juries Commissioner to defer jury service to arrange adjustments

- 11.57 To assist Juries Victoria to respond to the practical challenges of providing adjustments, the Commission recommends that the Juries Commissioner is given a new 'own motion' power to defer a person's service so that Juries Victoria can arrange reasonable adjustments.⁵⁹ This power should be used sparingly. We understand that Juries Victoria is flexible in relation to deferrals and currently defers service for up to three months but generally only once, for a particular reason.⁶⁰

⁵⁴ Consultation 16 (Office of Public Prosecutions Victoria).

⁵⁵ Submission 13 (Juries Victoria).

⁵⁶ This was suggested in Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

⁵⁷ Consultation 4 (Victorian Criminal Bar Association).

⁵⁸ *Juries Act 2000* (Vic) s 1(b).

⁵⁹ In relation to assistance animals, the County Court submission raised concerns about the potential for fellow jurors to have animal allergies or phobias. This issue, if it arises, could also be managed with the new own motion power recommended for the Juries Commissioner to defer jury service (of either juror). Other existing powers allow the court to excuse a person who is unable to serve, to discharge a juror, or determine that a person not perform jury service: *Ibid* ss 12, 32(3)(b), 43.

⁶⁰ Information provided by Juries Victoria to Victorian Law Reform Commission, 17 May 2022.

- 11.58 Some responses raised concerns that the use of adjustments could delay the trial and prejudice the administration of justice.⁶¹ The OPP raised concerns about the effect this would have on other jurors—if extra time is needed to allow a deaf juror to serve, does that mean that someone else will not be able to serve?⁶²
- 11.59 The Commission's view is that this issue is sufficiently captured by the ACT Act section 16(3)(a): 'whether the support would impose a disproportionate or undue burden on court resources, facilities and time frames' or by the general discretion to consider 'any other issue the judge considers relevant'.
- 11.60 Additional breaks or other changes should not be a significant barrier to participation, except perhaps where trials are scheduled to run for a long time or involve many complex documents. In this situation, it may be reasonable to determine that the person from the subject groups should not serve and for a judge to return them to a pool to potentially serve on another trial.

Considerations—court accessibility

- 11.61 Many courtroom buildings in Victoria are difficult to access. The courts have told us that they are taking steps to improve accessibility, but this is dependent on funding and often limited by heritage restrictions.
- 11.62 The Supreme Court in Melbourne was built in 1874 and 'was not built with a view to the accessibility of people with disabilities or the community generally'.⁶³ The Supreme Court submission stated:
- The Supreme Court operates in heritage listed buildings which have very limited capacity to be adapted to comply with modern accessibility standards in relation to the spaces occupied by jurors. For example, jurors must negotiate steep stairs in courtrooms used for criminal trials, which could present a significant safety risk for jurors who are blind or have low vision. There is limited space in the Court's jury rooms, so it may not be possible to accommodate support persons or support animals in some of those rooms. In some circumstances the Court can arrange to hold trials in the courtrooms in the County Court building which does not have these issues to the same degree, however this is generally well in advance of trial so may not be able to be arranged at short notice.⁶⁴
- 11.63 Peter Ward, a legal practitioner who has low vision, agreed that the Supreme Court building is very difficult to navigate: 'I usually go with someone from the office, who can help me find the court etc. It is a nightmare in terms of getting into court'. He suggested that the 'County Court is infinitely better, mostly because it is laid out in a sensible way!'⁶⁵
- 11.64 Dr David Squirrell, a community member, suggested that people with disabilities are often not consulted about accessibility. His comments were made in relation to South Australian courts but are also applicable to Victoria. He observed that:
- court buildings are often inaccessible to wheelchairs and mobility scooters (gophers)
 - court toilets often do not have disability-friendly doors
 - there is a lack of standardisation of facilities across the courts
 - tactile ground surface indicators are needed to assist people who are blind or have low vision to navigate court buildings.⁶⁶

61 Submission 14 (County Court of Victoria). Discussed further in Chapter 9.
62 Consultation 16 (Office of Public Prosecutions Victoria).

63 Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

64 Submission 11 (Supreme Court of Victoria).

65 Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

66 Submission 2 (Dr David Squirrell).

- 11.65 Other responses suggested the following improvements to courtrooms should be made:
- better lighting
 - adjusting lighting to prevent glare for people who have low vision
 - reducing sound reverberations by carpeting floor and walls to reduce echo.⁶⁷
- 11.66 Juries Victoria advised that it 'won't know until the very last minute which trial, if any, a person in the subject groups will be randomly balloted to'.⁶⁸ This makes it hard to plan, adapt and change arrangements about court accessibility. The Commission also acknowledges that witnesses and parties may also require accessible court facilities, and that these demands will trump the needs of a juror to have a trial heard in an accessible courtroom. The County Court registrars advised the Commission that courtroom allocation 'is dependent on the length of the trial/number of jurors required, the number of accused and whether the matter will proceed as an e-trial'.⁶⁹
- 11.67 Despite these challenges, the Commission does not support including an additional factor in the legislation relating to the accessibility of the courts.
- 11.68 The County Court suggested that Juries Victoria and the Court would need to work together to identify suitable trials for potential jurors from the subject groups. In terms of allocating trials to accessible courtrooms, the County Court noted that:
- it would be a significant challenge to swap trials, courtrooms or jurors on jury panels on the day of trial, particularly during the pandemic. Any arrangements for suitable trials and courtrooms would need to be done in advance of the trial commencement date.⁷⁰
- 11.69 Although Juries Victoria will not know until the last minute which trial a person will be balloted to, it will know earlier that there is a potential juror in the jury pool who requires adjustments. Juries Victoria should notify the registry and ascertain if any of the trials linked to a jury pool could be heard in accessible courtrooms or if any adjustments could be made to get around accessibility problems.

A new power for the Juries Commissioner to hold a person out of a jury pool where a trial is in an inaccessible courtroom

- 11.70 We also recommend that the Juries Commissioner be given the power to hold a person's card out of a ballot for a panel where the trial will be heard in a courtroom that cannot accommodate reasonable adjustments. The person's card could then be returned to the pool for the next panel ballot. Section 10 of the Act should be amended to enable an appeal of this decision by the Juries Commissioner to the court. This appeal would be heard urgently on the day and may encourage the court to find accessible facilities.
- 11.71 It will be important for Juries Victoria to collect data about how often this power is exercised to enable the courts to plan for future improvements (see Chapter 19).

Improving accessibility in Victorian courts

- 11.72 The courts should take steps to improve the accessibility of courtrooms for people in the subject groups to enable them to participate as jurors. These improvements will benefit many members of the community in addition to those in the subject groups.
- 11.73 Court Services Victoria (CSV) is currently undertaking Disability Discrimination Act compliance works at selected court buildings, including updating stairs and ramps, lighting, and entry way improvements to ensure safe and secure access and amenities.⁷¹ CSV has advised that 'by 2023 CSV will have delivered DDA compliance upgrades to ten regional law courts (Colac, Hamilton, Robinvale, Benalla, Cobram,

67 Consultation 5 (Expression Australia).

68 Submission 13 (Juries Victoria).

69 Consultation 12 (Consultation with Victorian County Court Registrars and Court policy staff).

70 Submission 14 (County Court of Victoria).

71 Court Services Victoria, *Delivering Excellence in Court and Tribunal Administration* (Annual Report 2020–21, 2021) 32.

St Arnaud, Castlemaine, Wangaratta, Bacchus Marsh and Sale). Some compliance work is under way in respect to the William Cooper Justice Centre and the Supreme Court of Victoria, both located in the Melbourne CBD'.⁷² This work should be built upon to improve accessibility in Victorian courts to enable jury service for people in the subject groups.

- 11.74 The CRPD requires States Parties to progressively achieve 'universal design', which is defined under article 2 as 'the design of products, environments, programmes, devices and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design'.⁷³ Victoria's State Disability Plan 2022–2026 commits to implementing 'universal design principles' across infrastructure to 'support people with disability to take part in their local community'.⁷⁴
- 11.75 The Government of the United Kingdom has recently invested £1 billion to modernise courts and tribunals, 'seeking to boost the use of technology, upgrade systems, and ensure it better responds to the needs of the public'.⁷⁵ While recognising the different size and scale of the court and tribunal system across England and Wales, the Commission recommends that the Victorian Government similarly invests in court updates to ensure that the courts are accessible for people who are deaf, hard of hearing, blind or have low vision.

Considerations—the presence of a non-juror and delay

- 11.76 The ACT Act includes a decision-making factor relating to the juror's impact on jury deliberations. Section 16(3)(b) states that the judge may consider:
- if the support would require a non-juror being present during jury deliberations, whether the non-juror's presence would inhibit or restrict discussion, or unduly pressure or influence any juror.⁷⁶
- 11.77 The County Court supported the inclusion of this factor in Victorian legislation.⁷⁷ In contrast, the Supreme Court noted:
- if the policy position is reached that support persons should be an exception to the common law prohibition then it would be preferable to have clear legislative amendment to that effect. Further consideration would be needed about whether the court making an individual determination about inhibition of discussion or undue pressure is an appropriate course. Consideration would also need to be given to developing a standard direction before the jury commences deliberation, regarding the presence of non-jurors in the jury room.⁷⁸
- 11.78 The aim of the Commission's recommended reforms is to limit the operation of the 13th person rule. The safeguards we have recommended aim to ensure that jury deliberations will not be inhibited or restricted by the presence of an Auslan interpreter or a support person in the jury room. For that reason, the Commission does not support including a section 16(3)(b) factor in the Act.
- 11.79 The County Court also argued that 'further emphasis' needs to be placed on the 'accused's right to a fair trial and on the fairness of any delay or inconvenience to other jurors'.⁷⁹ The Commission does not agree that concerns about inconvenience or delay are of sufficient importance to warrant specific inclusion as a decision-making factor in the Act. It is difficult to see how a judge could make an assessment about delay and inconvenience at the commencement of a trial, assuming that all of the other requirements in Chapters 14 and 15 regarding training, qualification and oaths as to non-interference are complied with.

⁷² Information provided by Court Services Victoria to Victorian Law Reform Commission, 23 June 2022.

⁷³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into Force 3 May 2008) art 2.

⁷⁴ Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022) 22.

⁷⁵ Ministry of Justice (UK), 'Law Change Opens Door to Deaf Jurors' (Press Release, 9 March 2021) <<https://www.gov.uk/government/news/law-change-opens-door-to-deaf-jurors>>.

⁷⁶ *Juries Act 1967* (ACT) s 16(3)(b).

⁷⁷ Submission 14 (County Court of Victoria).

⁷⁸ Submission 11 (Supreme Court of Victoria).

⁷⁹ Submission 14 (County Court of Victoria).

What evidence should the judge consider?

- 11.80 The Commission does not hold the view that the Act needs to define the material or evidence that a judge may take into account in reaching a decision about the use of reasonable adjustments. However, it would be helpful to include a sub-provision stating that a judge may consider any evidence they deem relevant.

What should happen if a judge decides that adjustments cannot be provided?

- 11.81 The Commission recommends that legislation provide two options if a decision is made not to provide reasonable adjustments:
- 1) Firstly, that courts and Juries Victoria have the power to return the person to the jury pool to potentially serve on a different trial.
 - 2) Alternatively, in a situation where it may not be possible for a person from the subject groups to serve with reasonable adjustments on any jury, a judge should excuse the person from their summons. We note that a judge also has existing powers under section 12 to order that the person not perform jury duty for the whole or part of their jury service, or for a period determined by the court, or permanently.
- 11.82 The option to return a prospective juror to the jury pool was widely supported in responses.⁸⁰ Juries Victoria referred to a similar power in section 29(4B) of the Act, which gives the Juries Commissioner the power to exclude a person from a pool if they are satisfied that the person is unavailable to sit on a trial due to its likely length.⁸¹
- 11.83 The County Court proposed that the decision to return a person to the pool should be assessed on a case-by-case basis.⁸² Vision Australia noted:
- On balance, we believe that such a power is necessary: we can envisage a (small) number of situations in which a person who is blind or has low vision would be unable to discharge their duties as a juror, for example, because of inherently visual components of key evidence. However, such a power must be accompanied by a clear expectation that it is to be used sparingly, as a last resort after all other options have been explored.⁸³
- 11.84 One survey respondent proposed that a juror should only be returned to the pool with their agreement, to avoid a situation where 'they are continually/indefinitely put in a jury pool and never get to serve'.⁸⁴
- 11.85 Under the proposed reforms, the prospective juror will be able to express their wishes to Juries Victoria and the court. If the person does not wish to be returned to the jury pool, then the judge would be able to consider excusing them from their summons or exercising powers under section 12.
- 11.86 Two survey responses did not support returning a prospective juror from the subject groups to the pool because they thought it could lead to 'jury shopping'.⁸⁵ The Commission notes that the random nature of jury selection and the judicial supervision of the process should prevent this from occurring.⁸⁶

80 Submissions 4 (Baer Arnold & Bonython), 7 (Law Institute of Victoria), 10 (Vision Australia); Consultations 16 (Office of Public Prosecutions Victoria), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW). We also note that 78% of survey responses received by the Commission supported the return of a person to the jury pool if they are unable to serve on a particular trial.

81 Consultation 10 (Juries Victoria); *Juries Act 2000* (Vic) s 29(4B).

82 Submission 14 (County Court of Victoria).

83 Submission 10 (Vision Australia).

84 Online Survey (Response 20).

85 Jury shopping is the practice of intentionally selecting a favourable jury. It is perhaps more relevant to the United States, where a voir dire questioning process happens for potential jurors. We discuss this in Chapter 10.

86 Online Survey (Response 2); Online Survey (Response 26).

Recommendations

1. The *Juries Act 2000* (Vic) (the Juries Act) should be amended to require that where a judge considers that reasonable adjustments would enable a person who is deaf, hard of hearing, blind or has low vision to serve as a juror, the judge must direct that those adjustments be provided or direct that the Juries Commissioner provide them.
2. The Juries Act should be amended to provide that, in making a decision about the provision of reasonable adjustments, the judge may consider how the adjustments may affect the trial, the impact on court resources and any other issue that the judge considers relevant. The Juries Act should also specify that the judge may be guided by any evidence that they consider relevant in making their decision.
3. The Juries Act should include a non-exhaustive list of possible adjustments that can be supplemented by regulation. The list of possible adjustments should include: Auslan interpreters; support persons; an assistance animal; and disability aids including technological aids that facilitate communication, for example, with speech-to-text software and screen reading programs.
4. The Juries Act should be amended to limit the operation of the 13th person rule to the extent necessary to allow interpreters or support persons in the jury room, as directed by the court.
5. Schedule 2 clause 3(a) of the Juries Act should not apply if a judge rules that reasonable adjustments can be provided to enable a person in the subject groups to serve as a juror.
6. The Juries Commissioner should be given a new own motion power in the Juries Act to defer jury service for a person in the subject groups to better enable the provision of reasonable adjustments.
7. The Juries Commissioner should be given a new power in the Juries Act to hold a person out of a ballot for a panel where a trial is to be heard in a courtroom that cannot accommodate reasonable adjustments that would enable that person to serve as a juror.
8. A decision by the Juries Commissioner to hold a person out of a ballot should be appealable under section 10 of the Juries Act to either the County Court or the Supreme Court. This matter should be dealt with in an urgent interlocutory hearing.
9. The Juries Act should be amended to provide that if a judge determines that reasonable adjustments should not be provided to a juror in a particular trial, the judge may either return the person to the jury pool to potentially serve as a juror on another trial or excuse the person from their summons. In determining whether to excuse a person from their summons the judge may consider the wishes of the person.
10. The Victorian courts should build on existing building improvement programs to improve court accessibility to enable people who are deaf, hard of hearing, blind or have low vision to serve as jurors.

CHAPTER 12

Reforming court and Juries Victoria processes to remove barriers to inclusive juries

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12. Reforming court and Juries Victoria processes to remove barriers to inclusive juries

Every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of his or her request for adjustment [must be] carried out and all reasonable accommodation[s] duly provided to enable his or her full participation.¹—United Nations Committee on the Rights of Persons with Disabilities

Overview

- The practices and procedures of Juries Victoria and the courts need to change to accompany amendments to the Juries Act.
- We do not expect a large number of people to use reasonable adjustments on Victorian juries. Recommendations therefore aim to work within existing jury selection processes and retain the existing flexibility to respond to the needs of the court and potential jurors as they arise.
- The new practices and procedures should enable the person from the subject groups to discuss their needs and abilities from the start, and provide them with the opportunity to be heard by a judge.
- The County and Supreme Courts have different case management practices, and there is uncertainty about whether recent changes will remain after the coronavirus (COVID-19) pandemic. Therefore, the courts and Juries Victoria will need to work together to work out the finer details of implementation.

Introduction

- 12.1 The aim of this chapter is to provide the courts and Juries Victoria with guidance about how legislative reforms (recommended in Chapter 11) can be put into practice.
- 12.2 County Court consultees stressed the importance of practical recommendations:
- The Commission's recommendations should outline clearly, in a very practical way, how to reform the jury system and enact this reform. This is preferable to merely providing a conceptual review of the need to provide reasonable adjustments.²

¹ Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [8(b)(i)] ('*JH v Australia*'). The same conclusion was reached in Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) [9(b)(i)] ('*Beasley v Australia*') and Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [9(b)(i)] ('*Lockrey v Australia*').

² Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

- 12.3 The Supreme Court identified that, in developing reform options, there will inevitably be a tension between:
- dealing with matters as far in advance as possible to promote the efficient administration of justice; and
 - allowing an individual's circumstances, including the nature of their disability, to be taken into account.³
- 12.4 The number of people who might serve on Victorian juries with reasonable adjustments is likely to increase over time but will remain small. Because of this, it is not necessary to create complicated new systems and processes. Instead of re-imagining the entire jury selection process, reforms to current procedures should suffice.
- 12.5 This chapter begins by considering the challenges posed by the Victorian jury selection process. It then reviews procedural frameworks in other jurisdictions, especially the Australian Capital Territory (ACT) and England and Wales, where people with disabilities can serve with reasonable adjustments. The chapter reviews the options for reform suggested by the Supreme Court, County Court, Juries Victoria and others. The Commission then provides recommendations on how processes should change to enable people from the subject groups to serve as jurors.
- 12.6 The Commission's recommendations focus on:
- the roles and responsibilities of Juries Victoria and the courts
 - how to fit a judicial assessment of the provision of reasonable adjustments into the existing jury selection process
 - what information the court should provide to counsel and jurors about reasonable adjustments.

The Victorian jury selection process: challenges for reform

- 12.7 The Victorian jury selection process presents several challenges for implementing our recommendations:
- It is difficult to plan in advance.
 - The Victorian courts are busy.
 - The Supreme and County Courts' case management systems operate differently.
 - Regional courts have varying levels of accessibility.
- 12.8 These challenges are discussed in the following paragraphs. Court accessibility was discussed in Chapter 11.

It is difficult to plan in advance

- 12.9 Reasonable adjustments may need to be provided during three stages of the jury selection process:
- The early stage*—the person attends court in response to a summons and is briefed by Juries Victoria, excuses are called for and people are randomly balloted to a panel.
 - The middle stage*—the potential juror moves to the courtroom as part of a panel to hear information about the upcoming trial, and may again seek to be excused. At this stage the potential juror might be 'challenged off' by the accused through the peremptory challenge process or stood aside by the Crown.
 - The final stage*—the person has been selected to serve as a juror and the trial commences.

- 12.10 The jury selection process makes it difficult to plan for the provision of reasonable adjustments because it is hard to know whether the adjustments will be needed for trial as well as the empanelment process. The person in the subject groups may seek to be excused or have their jury service deferred at multiple points in the selection process. The prospective juror may not be randomly balloted to a panel, or might be challenged or stood aside at the end of the empanelment process.
- 12.11 Because of the random balloting process, it will not be known which trial, if any, a person in the subject groups will be randomly balloted to until the last minute.⁴ This makes it difficult to find a time in advance of empanelment to hold a hearing to determine whether the person could serve on a particular trial. But there are valid concerns that doing everything on the day of empanelment will place a strain on the court system.
- 12.12 Not knowing which trial a person in the subject groups will be balloted to also makes it difficult to arrange to hold the trial in an accessible courtroom.

Victorian courts are busy

- 12.13 In Chapter 11 we recommended that Victoria use the Australian Capital Territory (ACT) legislation as a guide for Victorian reforms. However, Victoria is a much larger and busier jurisdiction than the ACT. For example, we were told that before the coronavirus (COVID-19) pandemic, a busy day in the Melbourne County Court would involve empanelling 5–8 trials with approximately 180 people in the jury pool.⁵
- 12.14 The ACT courts hear significantly fewer trials.⁶ The ACT sheriff advised that there are only five judges available who would typically run a jury trial in the Supreme Court.⁷ We were told that generally the maximum number of trials running on a given day is two. Before the pandemic the Court might hear five trials a week.⁸ The ACT has no intermediate court equivalent to the County Court in Victoria, nor does it have regional circuits.
- 12.15 Case management practices in the ACT are based on an individual docket system, which makes it easier to plan for the delivery and assessment of supports. Cases may be allocated to a judge at any time from several months before the trial up to the week before. Courtrooms are generally allocated a week in advance and judges are assigned their own courtroom for all their trials.⁹

The Supreme and County Courts operate differently

- 12.16 There are differences between the case management approaches of the Victorian County Court and the Supreme Court, making it difficult to devise a procedural approach that suits both. In the Supreme Court the trial judge has more control over pre-trial issues. There are fewer trials to manage and trial dates are more certain.¹⁰ In this way, the Supreme Court more closely resembles practice in the ACT.
- 12.17 The Commission understands that the Victorian courts have changed their case management processes to adapt to the pandemic.¹¹ We discuss changes in the County Court below. While the courts are hopeful that these changes will continue, this remains unclear at the time of writing.

4 Submission 13 (Juries Victoria).

5 Information provided by Juries Victoria and Victorian Law Reform Commission, 19 May 2022.

6 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

7 Information provided by ACT Sheriff to Victorian Law Reform Commission, 4 August 2021.

8 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

9 Information provided by ACT Sheriff to Victorian Law Reform Commission, 4 August 2021.

10 Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

11 'Coronavirus (COVID-19) Divisional Responses', *County Court of Victoria* (Web Page, 24 November 2021) <<https://www.countycourt.vic.gov.au/news-and-media/news-listing/2021-11-24-coronavirus-covid-19-divisional-responses>>; 'COVID-19 and the Court', *Supreme Court of Victoria* (Web Page, 27 April 2022) <<https://www.supremecourt.vic.gov.au/news/covid-19>>.

How other jurisdictions provide reasonable adjustments

- 12.18 In the ACT and England and Wales, many of the steps involved in arranging and assessing the provision of reasonable adjustments occur before the potential juror is required to attend court. A person notifies the court early in the process about their need for adjustments.¹² They can visit court ahead of the summons date to discuss their circumstances and needs.¹³ Jury service may be deferred while supports are arranged. A senior court official or the sheriff makes a preliminary assessment about the provision of reasonable adjustments with the final decision being made, if necessary, in a hearing before a judge attended by the person with a disability.¹⁴
- 12.19 We note that because no one has yet served on a jury pursuant to the new ACT Act, the information that follows is the likely approach as outlined by the ACT sheriff.¹⁵

Key elements of the ACT approach

- 12.20 Information sent out with the jury summons advises people to contact the court if they have a disability and wish to serve with supports.¹⁶ The person seeking to use supports can have a pre-empanelment visit to the court to tour the court building, courtroom and to discuss their needs with the sheriff.¹⁷
- 12.21 If a person seeks to use supports on the day of empanelment, jury duty will likely be deferred to a later time to allow the necessary information to be gathered and arrangements made by the ACT sheriff.¹⁸
- 12.22 The sheriff will make a preliminary recommendation to the court about the provision of supports to enable jury service. In making a recommendation the sheriff will consider matters including:
- the supports requested
 - details of trials listed for the period the person has been summonsed
 - anticipated costs
 - impact on court resources, facilities and timelines.¹⁹
- 12.23 The sheriff will have information about trials including the charges, expected length of trial and trial callover outcomes.²⁰ Judges may have access to pre-trial material and may be better able to assess the evidence likely to be adduced. The sheriff may approach the prospective judges and discuss the provision of supports with them.²¹
- 12.24 It is expected that the sheriff's recommendation will be communicated to the person with a disability over the phone. If the person agrees with the recommendation, the matter can be dealt with on the papers. If the recommendation is not to provide supports, then the matter will be listed for a hearing before a judge. The sheriff will advise the person of the hearing date. It is preferable for the matter to be determined in advance of the trial. This is likely to be the week before trial if the Court is made aware of the need for supports early in the process.²²
- 12.25 If the matter has been allocated to a trial judge already and if a jury pool is specifically drawn for a single allocated trial, then the allocated judge is likely to determine the application for support. If the matter has not been allocated or the pool is drawn for several trials, it is likely that the chief justice would either hear the application or make

12 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020; Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

13 In the ACT the Deputy Sheriff will show the person around the court and discuss their potential needs: Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020; Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

14 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020; Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

15 Information provided by ACT Sheriff to Victorian Law Reform Commission, 30 May 2022.

16 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

17 Ibid.

18 Ibid.

19 See legislative factors listed in *Juries Act 1967* (ACT) s 16.

20 Information provided by ACT Sheriff to Victorian Law Reform Commission, 4 August 2021.

21 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

22 Ibid.

a determination about how it should be dealt with. Ultimately, it will be up to the chief justice or an allocated judge to make any determinations.²³

- 12.26 The judge will consider the issue and may discharge the person from further attendance under that summons. The hearing is likely to occur in private and the judge may 'conduct the hearing and consider such evidence as she or he thinks fit'.²⁴
- 12.27 If the judge determines that the person with a disability can serve with supports, they will participate in the empanelment process. If they are not challenged they will be sworn in and provide an oath/affirmation, as will the supporter or interpreter.²⁵

The approach in England and Wales

- 12.28 The approach to providing reasonable adjustments in England and Wales has the following key elements:
- A senior court official first makes an assessment about the provision of reasonable adjustments. The court official explains that the person can apply to be excused.²⁶
 - If the juror does not want to be excused and the court officer has doubts about a person's capacity to act effectively as a juror because of a physical disability, that person is brought before a judge to determine the issue.²⁷ Court staff do not have any power to discharge a juror under their summons. The hearing will occur in the court that the person has been summonsed to attend, generally before the beginning of jury service.²⁸
 - The judge 'shall affirm the summons unless [the judge] is of the opinion that the person will not, on account of [their] disability, be capable of acting effectively as a juror, in which case [the judge] shall discharge the summons'.²⁹ If the potential juror is deaf, the judge must consider 'whether the assistance of a British Sign Language interpreter would enable that person to be capable of acting effectively as a juror'.³⁰ If so, the judge now has the power to appoint one or more interpreters to facilitate that person's jury service. The 13th person rule will continue to prevent a juror from obtaining assistance from a non-juror, other than a British Sign Language (BSL) interpreter, in jury deliberations.
 - The judge could choose to release the potential juror from the panel or from service entirely, or if not, decide that the potential juror could fully participate.³¹
 - Her Majesty's Courts and Tribunal Service (HMCTS) has advised that if the situation is addressed at the start of or before jury service, the assessment by the judge is about capacity to serve generally across all trials. The judge makes their assessment by speaking to the juror and asking questions. If the juror has been selected to form part of a panel from which a jury is selected and needs reasonable adjustments to participate, the judge may consider the nature of the evidence in that particular trial. For example, if the juror is partially sighted and there is a lot of visual evidence, the judge may decide that the juror would not be able to fully participate.³²

23 Information provided by ACT Sheriff to Victorian Law Reform Commission, 4 August 2021.

24 Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

25 Ibid.

26 Information provided by Her Majesty's Courts and Tribunal Service to Victorian Law Reform Commission, 17 August 2020.

27 *Juries Act 1974* (UK) s 9B(1).

28 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 15 September 2021.

29 *Juries Act 1974* s 9B(2).

30 *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196(2). This Act only applies to England and Wales.

31 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 15 September 2021.

32 Ibid.

Different approaches proposed for Victoria

- 12.29 In our consultation paper we asked whether a similar approach to that used in the ACT could work in Victoria. We asked for feedback on the respective roles of the courts and Juries Victoria.
- 12.30 The County Court, Supreme Court and Juries Victoria suggested three detailed approaches, which differ from each other, with some overlapping elements. Key elements of those proposals are summarised below. The submissions of these organisations can be viewed on the Commission's website.
- 12.31 All approaches supported changing procedural practices so that Juries Victoria is notified as soon as possible about the need for reasonable adjustments.³³

The County Court's proposed approach

- 12.32 The County Court proposed that Juries Victoria 'conduct the assessments and determinations' about adjustments. Undertaking work before trial 'will not only ensure the efficient commencement of a trial, it ensures all jurors are appropriately supported from the outset'.³⁴ County Court consultees did not think that it would be 'appropriate for the trial judge to have to make a determination about the provision of supports on the day of empanelment'.³⁵
- 12.33 Other elements of the County Court's suggested approach include:
- A judge or judicial registrar could designate an upcoming trial as accessible to those who may require supports. Identifying a trial as an accessible jury trial may be determined at the final directions hearing after discussion with the parties, including whether there are any issues in dispute that would require full hearing or sight, for example, visual or voice identification.³⁶ County Court consultees suggested that 'judicial oversight of this assessment should guard against prejudicial judgements by parties'.³⁷
 - This information could then be provided by the Court to Juries Victoria so that jurors who require supports are not allocated to a trial that is not suitable. The Juries Commissioner would need a new power to achieve this.³⁸
 - A small pool of people in the Juries Commissioner's Office, with appropriate training and guidelines, could make those assessments instead of judges.³⁹

Consultees from the County Court suggested additional elements:

- The decision of the Juries Commissioner 'should be reviewable by an independent reviewer, for example a Judicial Registrar or a List Judge in advance of the date the potential juror would be summonsed for service. It should not be left to a trial judge when empanelling'.
- On the day of empanelment, if a potential juror is attending with adjustments, the selection of the jury panel would proceed as normal. The judge would talk about the use of supports in directions prior to the empanelment of the jury.
- An Auslan interpreter would be sworn in at the start of the empanelment process (consistently with the usual practice of swearing in interpreters as soon as they are needed to assist a person to participate in a hearing). At that point, the trial judge can state simply what the role of the interpreter is. The trial judge would hear any excuses and then the parties would proceed with their challenges or stand asides.
- The trial judge would swear in the jury and the supporter or interpreter would take an additional oath.⁴⁰

33 Submissions 11 (Supreme Court of Victoria), 13 (Juries Victoria), 14 (County Court of Victoria).

34 Submission 14 (County Court of Victoria).

35 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

36 Submission 14 (County Court of Victoria).

37 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

38 Submission 14 (County Court of Victoria).

39 Ibid.

40 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

Recent changes to case management practices in the County Court

- 12.34 The Commission was told in consultations with County Court Registrars that changes to case management practices have flowed from the County Court's response to the pandemic. Cases are now being allocated to a trial judge one to two months ahead of trial (rather than a few days). Courtrooms are now being allocated several weeks before trial (not the week before). In regional areas, trials are allocated to a judge a minimum of eight weeks before trial. The first day of trial now generally proceeds with jury empanelment.⁴¹
- 12.35 The changes mean that trial judges now commonly make determinations on pre-trial issues, including issues regarding the cross-examination of witnesses, evidentiary arguments and whether the matter is ready for trial. County Court judicial registrars suggested that:
- the new case management system would allow sufficient time for the Court to consider whether an upcoming trial would be suitable for a juror who has vision or hearing loss. The Court would have sufficient information early on to make this decision before empanelment. It would be best to front-load the issue of this assessment and for it to occur close to the trial commencement date, preferably soon after the trial is allocated to a trial judge.⁴²
- 12.36 The judicial registrars told us that the Juries Commissioner is provided with trial listings approximately one and a half months before trial dates. If the trial is a criminal trial, the Juries Commissioner is notified of the estimated duration of the trial, the number of accused and the charges. The Juries Commissioner is notified of the number of panels needed each week and once the trial is allocated, the judge's chambers is in contact with Juries Victoria to confirm logistics.⁴³

The Supreme Court's proposed approach

- 12.37 The Supreme Court submission notes that it does not put forward a procedural solution but instead 'suggests options for the Commission's consideration and identifies potential drawbacks associated with those options where relevant'.⁴⁴ The Court's approach can be summarised as follows:
- A post-committal directions hearing or a later directions hearing could be used as an information-gathering exercise to ask counsel whether the trial might be suitable for a juror from the subject groups. This consideration 'would be at a level of abstraction as regards the nature of the disability and the supports available'.
 - If a person from the subject groups is summonsed, Juries Victoria could book any necessary adjustments for attendance at court. If adjustments could not be arranged, the person could be invited to defer their service. The Court queried whether the Juries Commissioner should have an own motion power to defer service.
 - At the summons stage, Juries Victoria might also consider if adjustments could be made available if the person was selected on a panel. If adjustments could not be arranged, the person could be invited to defer their service.
 - When a panel is requested by a judge, Juries Victoria could notify the judge's chambers that a person in the pool requires adjustments. Juries Victoria could ask if the judge has any concerns with a person from the subject groups serving as a juror in the particular trial.
 - After being balloted to a panel, the trial judge could give Juries Victoria a non-binding indication that the trial appears unsuitable for all or certain people in the subject groups to serve as a juror, and Juries Victoria could be informed. The Court cautioned against this being a binding decision because 'judges may find it difficult

41 Consultation 12 (Consultation with Victorian County Court Registrars and Court policy staff). It was noted that matters are not allocated as early in the Common Law List because they are more likely to settle before trial.

42 Ibid.

43 Ibid.

44 Submission 11 (Supreme Court of Victoria).

to make a determination without regard to a specific juror and their specific needs'. It may also give rise to legal challenges from the person that has been excluded.

- If the non-binding direction raises concerns, Juries Victoria could ask the person if they are content to be excluded from a panel where the trial judge has given an indication of unsuitability. Juries Victoria would need a clear statutory power to exclude them. The person could then be balloted to a different trial.
 - If the person is not content to be excluded, they would remain on the panel. The Court could push empanelment back by one or two hours to hold a hearing to determine capacity to serve. The Court noted 'it is not unusual for the Court to delay arrival of a panel in order to deal with an issue that has arisen on the morning of empanelment'.
 - The court could hear from the person and counsel. If the court determines that the person would not be capable of serving with supports then the Court should decide whether to return the person to the pool or to discharge them from their summons.
 - If the court determines that the person can serve, then the person could wait in court for everyone else or choose to be returned to the pool room.
- If the preliminary non-binding direction does not raise any concerns about a person serving with reasonable adjustments, then before the panel arrives in the courtroom, the judge could explain to counsel what will happen.
- When the panel is seated in the courtroom, the trial judge's briefing could also include a statement that it is important to be able to understand and assess all types of evidence in a trial. A person may want to be excused after being provided with information from the trial judge in the briefing.
- If it becomes necessary to excuse or exclude a person from the subject groups during empanelment, this should occur in a respectful and sensitive manner, perhaps in a private hearing. An excluded juror should be required to return to the jury pool unless the court orders otherwise.
- After swearing in the jury, there may need to be a short adjournment to discuss with counsel seating arrangements during the trial, breaks for support persons such as Auslan interpreters, and possibly the need to adjust how they speak. The judge will need to discuss with counsel that the trial may take longer than estimated, particularly if Auslan interpreters are used. If the additional time required is significant, the court may need to confirm with jurors that there are no issues with the new estimate.
- After the adjournment, when first addressing the jury, the trial judge could explain the following additional matters:
 - the adjustments that will be used during trial
 - seating arrangements
 - matters relating to Auslan interpreters
 - that if jurors have any concerns about adjustments, they can raise them with the court.⁴⁵

Juries Victoria's proposed approach

- 12.38 Juries Victoria submitted that a 'trial judge may not be best placed to be the primary assessor as to whether or not a person' from the subject groups can discharge their duties. It argued that 'any assessment by the trial judge cannot be the first or only assessment made' nor the most detailed.⁴⁶

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Ibid.
Submission 13 (Juries Victoria).

12.39 Juries Victoria raised concerns that the random balloting process means that trial judges would be unable to make a decision ahead of the empanelment process. It did not support delaying empanelment to make this assessment because this would:

- 'significantly single out the person', potentially causing distress.
- the remainder of the panel would need to wait outside the courtroom, raising concerns about the risk of contamination of the jury and logistical problems with having 'upwards of 35 people clustered' outside the courtroom.
- delay empanelment.

12.40 Instead, Juries Victoria suggests the following assessment process:

Informing Juries Victoria about disability

- The jury management system could alert Juries Victoria when a person summonsed had earlier indicated they may need reasonable adjustments. 'Once flagged, a Juries Victoria staff member would contact the individual to initiate a conversation around the provision of supports'.

Stage 1: Juries Commissioner

- The Juries Commissioner should make the initial assessment about whether adjustments could be reasonably provided. This would occur when summonses were created, roughly two months before the date of attendance on the summons.

Stage 2: Judicial officer

- A judicial officer, through a discussion with the person in the subject groups, would make a detailed assessment 'as to what elements in a specific trial may render it unsuitable for them to serve on as a juror'. Juries Victoria suggests that this would be a general assessment of the overall suitability of trials.⁴⁷ The judicial officer could be drawn from a panel comprising representatives from the criminal and common law divisions of both the Supreme and County Courts.

Stage 3: Trial judge

- In the days prior to empanelment, the trial judge would make a final assessment as to the suitability of their trial to have a jury with a member of the subject groups based on the detailed assessment conducted earlier. The trial judge would be required to notify Juries Victoria if they determined the trial was not suitable.

Balloting the jury panel

- On receipt of the judge's notification of trial unsuitability, Juries Victoria would remove that person's ballot card from the pool when randomly selecting the panel for that trial. The ballot card would remain for other trials not deemed unsuitable. Juries Victoria suggested that an amendment to the Act would be needed to provide similar powers to the Juries Commissioner that are currently in place for lengthy trials.⁴⁸

Other proposals

12.41 In consultation, the Law Institute of Victoria (LIV) raised the possibility of trial suitability being discussed in a directions hearing, while noting that the final decision should be made by the trial judge.⁴⁹

12.42 Victoria Legal Aid (VLA) proposed that Juries Victoria provide information about disability and what adjustments have been requested to the judge and parties before the jury panel enters the courtroom. At that stage there should be an opportunity for the parties and trial judge to discuss and decide whether that person can participate as a juror. The jury panel should not be present. VLA noted that 'critically the trial judge must have the final decision as to whether to empanel a potential juror, with the assistance of the parties'.⁵⁰ This should involve an assessment of the nature of the

47 The Commission notes that at this stage it will not be known what specific trial the person may be balloted to.
48 Submission 13 (Juries Victoria).
49 Consultation 2 (Law Institute of Victoria).
50 Submission 8 (Victoria Legal Aid).

evidence, the key issues at trial, and the potential juror's impairments and the supports and adjustments available.⁵¹

- 12.43 The Office of Public Prosecutions (OPP) did not think that all matters would need to go before a judge. However, it stated that it was important that the final decision is made by a judge.⁵²
- 12.44 The process suggested by the New South Wales Law Reform Commission (NSWLRC) was:
- The person would make an early request to be excused or notify the sheriff about adjustments required. The sheriff's office should have responsibility for ensuring adjustments.
 - Forewarned of potential problems, in the presence of counsel and prior to commencing empanelment, the trial judge could deal with the capacity of the juror to serve in the trial.⁵³

The Commission's conclusions: procedural reform

- 12.45 The Commission makes the following recommendations based on our analysis of the approaches proposed in submissions as well as overseas practice. Because the courts have different case management practices, and there is uncertainty about long-term changes to those practices following the coronavirus (COVID-19) pandemic, the courts and Juries Victoria will need to collaborate to work out the finer details of implementation.

Juries Victoria should request information from potential jurors about adjustments

- 12.46 Juries Victoria should obtain information early in the jury selection process about the need for adjustments and then investigate whether those adjustments can be reasonably provided.
- 12.47 The questionnaire (jury eligibility form) and the juror summons should be amended to notify the community that people who are deaf, hard of hearing, blind or have low vision are able to serve on Victorian juries with reasonable adjustments. Potential jurors from the subject groups should be asked to contact Juries Victoria to discuss their needs. A range of accessible contact details should be provided to accommodate people in the subject groups.⁵⁴
- 12.48 If possible, Juries Victoria's jury management system should be programmed to flag any summonsed individual who had previously indicated that they are deaf, hard of hearing, blind or have low vision. This approach was supported by the courts, Juries Victoria, the LIV and Vision Australia.⁵⁵ For example, if a person identifies that they are deaf and require Auslan interpreters to serve, Juries Victoria should contact Auslan service providers as soon as possible to ensure that interpreters will be available on the date the person is required to attend court.
- 12.49 Vision Australia suggested that it should not be mandatory to disclose that a person is deaf, hard of hearing, blind or has low vision in response to the questionnaire or summons. Instead, it should be open to the potential juror to request the provision of reasonable adjustments at any time 'including, in theory at least, after trial has commenced', noting:

⁵¹ Ibid.

⁵² Consultation 16 (Office of Public Prosecutions Victoria).

⁵³ New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [4.8].

⁵⁴ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

⁵⁵ Submissions 7 (Law Institute of Victoria), 10 (Vision Australia), 13 (Juries Victoria).

There may be situations where a person acquires a disability (or the impact of their existing disability changes) after they are summoned, or a person may, at the time of receiving the summons, be unfamiliar with the kinds of supports they would need if they were selected to serve on a jury. The majority of people who are blind or have low vision have had little if any experience serving on a jury and may need time and discussion with others before they can make informed decisions about the supports they would need.⁵⁶

- 12.50 Where Juries Victoria is notified later in the jury selection process about the need for adjustments, for example after the person attends court in response to a summons, the Commission anticipates that new own motion powers to defer service (discussed in Chapter 11) will provide Juries Victoria with more time to arrange those adjustments. Alternatively, the person could seek to be excused. If adjustments were requested after the trial has commenced, the judge would need to make a decision about whether it is necessary to discharge a juror.⁵⁷

Juries Victoria should discuss the provision of adjustments with the potential juror

- 12.51 Associate Professors Bruce Baer Arnold and Wendy Bonython stressed that the contact point for the new laws must be accessible to people so that 'it does not function as a tacit barrier to inclusion'.⁵⁸
- 12.52 VLA stated in its submission:
- VLA welcomes the VLRC's proposal for prospective jurors to be asked what supports they require to participate as a juror, and for a flexible and case by case approach to be adopted for the provision of supports. Given the diversity of experience of people who have vision and hearing impairments, it is critical that people with a lived experience of these disabilities are consulted on the types of individual supports that will assist them to participate as jurors.⁵⁹
- 12.53 The experiences of jurors (or potential jurors) with disabilities overseas indicates that what happens after a person first receives a jury selection notice and their early interactions with officials is important.⁶⁰
- 12.54 In line with community responses, the Commission recommends that the potential juror is given the opportunity to discuss their needs and abilities from the outset of the jury selection process. Juries Victoria is best placed to have this initial discussion. We agree with Juries Victoria that these discussions should occur when the summons is created.
- 12.55 This role is in keeping with the existing work of Juries Victoria, as it already has one-on-one conversations with many people about their jury service and special needs. More recently it has held conversations with people about social distancing requirements and their level of comfort coming into court during the pandemic.⁶¹ Discussing reasonable adjustments is an appropriate extension of its role.
- 12.56 Juries Victoria has existing powers to excuse a person for good cause for a short period or permanently, and to defer jury service. The conversations that Juries Victoria has with people from the subject groups early on in the selection process may free up the judge's time later on. Juries Victoria noted that 'time and availability constraints mean that a trial judge would not be able to listen to every reason or request not to serve'.⁶²

⁵⁶ Submission 10 (Vision Australia).

⁵⁷ *Juries Act 2000* (Vic) s 43.

⁵⁸ Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

⁵⁹ Submission 8 (Victoria Legal Aid).

⁶⁰ See the comments by Jim Moynihan in relation to his jury service in Missouri in 2002 in Chapter 10 at [10.32].

⁶¹ Consultation 10 (Juries Victoria).

⁶² *Ibid.*

Pre-empament court visits should be permitted

- 12.57 Consistent with the approach in the ACT and England and Wales, Juries Victoria should ask the person from the subject groups if they would like to attend court in advance of their summons date to discuss their adjustment needs and to familiarise themselves with court layout and general accessibility.
- 12.58 This will assist Juries Victoria to make its preliminary decision about whether it would be possible to provide reasonable adjustments (discussed below) and assist the potential juror to determine if they would like to seek to be excused. In addition to possible adjustments, Juries Victoria may also explore how courtroom layout might need to be adjusted and explain what the courts' expectations are of jurors.
- 12.59 A standard form should be developed by Juries Victoria to guide staff about key information to discuss. For example, what adjustments does the person need, which are available in the court, and which can be reasonably purchased or booked through a service provider in time? Juries Victoria should consult with HMCTS in England and Wales in preparing these documents, because of its extensive experience providing adjustments for people with disabilities.
- 12.60 Juries Victoria will need to coordinate with the registrars of the courts to arrange these visits. Court technology services may also need to attend. Arrangements may need to be made to cater for the individual needs of a potential juror.

Juries Victoria should coordinate the provision of adjustments

- 12.61 Juries Victoria is best placed to coordinate the provision of adjustments for several reasons. The County and Supreme Courts do not currently arrange many adjustments for witnesses and parties. Instead, adjustments are provided by the OPP⁶³ or arranged by the parties themselves.⁶⁴
- 12.62 The Supreme Court observed that, due to the 13th person rule and the historical exclusion of people from the subject groups, the Court 'has not had systems in place to provide those supports in the jury context. The Court would of course adapt its processes with changes to the law'.⁶⁵
- 12.63 Requiring Juries Victoria to take on this coordinator role means that the provision of adjustments will be coordinated centrally rather than separately in the courts and specifically for jurors. One agency will develop knowledge about adjustments and partnerships with service providers. Having a centralised approach to the provision of adjustments will be particularly important for Auslan interpreters because they are in short supply in the court system.
- 12.64 Juries Victoria has said in consultation that it is open to playing a role in arranging and paying for adjustments provided it is properly funded to do so.⁶⁶
- 12.65 Because the higher courts and Juries Victoria do not currently arrange adjustments for parties or witnesses, their staff will need training about the types of adjustments available and how they work, and should be funded by Government to provide them. Partnerships will need to be established with Auslan service providers to ensure services can be booked early. We discuss these issues further in Chapter 14.
- 12.66 Juries Victoria should cover the reasonable costs of the potential juror's travel to and from the court as part of the provision of adjustments if needed.

63 The OPP pays for adjustments, including interpreters for witnesses, victims, and for the accused, when requested by defence and supported by a reason. It also provides iPads in electronic trials: Consultation 16 (Office of Public Prosecutions Victoria).

64 The Supreme Court notes that it provides an accessible website, wayfinding systems, hearing loops, portable headphones, and communication assistance in accessing registry services: Submission 11 (Supreme Court of Victoria). The County Court notes that it has hearing loops in some courtrooms and public areas, but not in jury rooms. Headsets are available for use in all courtrooms if arrangements are made in advance: Submission 14 (County Court of Victoria).

65 Submission 11 (Supreme Court of Victoria).

66 Consultation 10 (Juries Victoria).

The Juries Commissioner should make a recommendation to the court

- 12.67 Consistent with the approach in the ACT and England and Wales, Juries Victoria should conduct a preliminary assessment about the provision of reasonable adjustments. This assessment should be conducted as soon as practicable in the pre-trial process, to ensure that no practical issues arise with providing reasonable adjustments.
- 12.68 The preliminary assessment should be guided by information from:
- the potential juror
 - a pre-court visit
 - the decision-making factors set out in the new obligation in the Juries Act (discussed in Chapter 11)
 - information provided by the court about courtroom organisation, the compatibility of technology and accessibility of courtrooms
 - preliminary conversations with trial judges if the matter has been allocated (discussed below) and information provided by the court when it requests a panel.
- 12.69 In most cases, this assessment is likely to be straightforward. For example:
- Can a hearing loop be provided?
 - Will the person be able to hear in the jury box where there is no hearing loop but where jurors are sitting in close proximity?
 - Are Auslan interpreters required?
 - Can a magnifier be provided or is it possible for court documents to be read on an iPad at closer proximity?
 - What other adjustments might the person need?
 - Is it possible and reasonable for the court to provide those adjustments?
- 12.70 If the recommendation is that adjustments should be provided, Juries Victoria should book them in for the selection process and enquire about their availability for trial should the person be selected as a juror.
- 12.71 A template form for the Juries Commissioner's recommendation should be created. This could be modelled on the ACT form, which outlines:
- pool number, member, pool period
 - trials during pool period
 - information regarding adjustment required (for example, Auslan interpreters, assistance animal, disability aid)
 - factors considered
 - anticipated costs
 - recommendation.⁶⁷

Juries Victoria could contact judges' chambers for further information about the trial

- 12.72 To assist the Juries Commissioner to make a recommendation, in the weeks leading up to trial Juries Victoria could inform the group of relevant trial judges, through judge's chambers, that there is a person in the pool who is from the subject groups. It could notify the judges of the adjustments the potential juror will need. Juries Victoria could ask trial judges for additional information about the upcoming trial/s to assist the Juries Commissioner to make a preliminary recommendation about jury service.
- 12.73 It would also be useful for more information to be provided to Juries Victoria about a trial when a judge's chambers requests a panel before the trial starts. At present, the information included in a panel request form from chambers is:

- the name of the judge
 - courtroom
 - accused/parties
 - case number
 - charge/claim
 - estimated duration of trial
 - time of empanelment.⁶⁸
- 12.74 The Commission recommends that chambers provide additional information about the evidence that is likely to be material to the outcome of a trial and that might make it difficult for the potential juror to serve on that trial. However, we acknowledge that the nature of a case and evidence on the brief may not always enable this to occur. It might not always be obvious whether something is material to the outcome of a trial at this point.
- 12.75 If, based on all the information that Juries Victoria has collected, it has no concerns, then it should confirm adjustments for the day the potential juror first attends on summons and in readiness for trial if the potential juror is ultimately selected.

When fair trial issues need to be considered

- 12.76 In some situations, for example, where the person is blind or requires Auslan interpreters, it may be difficult for the Juries Commissioner to make an assessment about whether adjustments will enable the person to perform their role, because they will not be familiar with the evidence likely to be presented at trial.

The final directions hearing should not inform the Juries Commissioner's recommendation

- 12.77 Although raised by the Commission in consultations, the Commission now does not think that the final directions hearing should generate a binding direction about the suitability of a trial for a person from the subject groups (albeit appealable to the Court). Such a direction would be made in the absence of any understanding of the particular adjustments required by the potential juror. It would run contrary to the recommendations of the United Nations Committee on the Rights of Persons with Disabilities' recommendations for an objective assessment of a person's request for an adjustment.⁶⁹
- 12.78 The Supreme Court suggested that rather than generating a binding outcome, the final directions hearing discussion could be an information-gathering exercise only, as the nature of the disability of the person would not be known. This information would then assist Juries Victoria in its preliminary assessment.
- 12.79 The Commission is of the view that although this information would assist, it may be inefficient to set this process up across all trials when it is likely that most will not be affected. It may also be unnecessary if recent case management changes remain so that the trial is allocated early, and the judge is across pre-trial issues.

A new power for the Juries Commissioner to hold a person out of a pool

- 12.80 The Juries Commissioner should have a new power to hold a person out of a pool when a panel ballot is being conducted for a particular trial if they do not think that reasonable adjustments can be provided. Section 10 of the Juries Act should be amended to enable an appeal of this decision by the Juries Commissioner to the court. The person's ballot card could then be returned to the pool for the next panel ballot. It will be important for Juries Victoria to collect data about how often this power is exercised (discussed in Chapter 19).

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Information provided by Juries Victoria to Victorian Law Reform Commission, 6 October 2020.
Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) 17 [g(b)] ('*Beasley v Australia*').

- 12.81 Pursuant to the new power recommended in Chapter 11 the Juries Commissioner could also defer the person's service so that the Juries Commissioner can better enable the provision of reasonable adjustments.
- 12.82 Alternatively, the Juries Commissioner may recommend to the court that the person is excused from their summons where it does not think that reasonable adjustments will enable them to serve at all. A final determination on this would need to be made by a judge.

The trial judge should make the final decision

- 12.83 Ultimately, when a person is balloted to a panel for a trial, the judge should consider whether the person in the subject groups can serve as a juror as allowed by the amended legislation.
- 12.84 If there are concerns, the Supreme Court approach envisages that empanelment might need to be pushed back by an hour or two to deal with these issues. It suggests that empanelment is often delayed for a variety of reasons and that this should be manageable.
- 12.85 Some submissions suggested that it would be important for counsel to be involved in this hearing.⁷⁰ Ultimately it will be up to the judge to decide how to conduct the hearing and what evidence to admit.
- 12.86 As few trials may be impacted by reforms, the simplest and fairest approach may be to occasionally delay empanelment to determine the matter. We are confident that Juries Victoria can work out a solution to the logistical issue it raises about where to put the remainder of the jury panel while the matter is being considered by the trial judge. The trial judge will have all the information collected by Juries Victoria to base their decision on so we do not think that this hearing will be lengthy.
- 12.87 We acknowledge that this approach may be more difficult in the County Court, where there are many more trials to be heard each day, and potentially more judges for Juries Victoria to consult with before empanelment.

The court should provide information about the use of adjustments

- 12.88 As with many parts of the conduct of a trial, the Commission thinks that it is best left to the trial judge to decide what directions should be given to the court about the use of adjustments, and when. We recommend that the Supreme and County Courts develop standard directions to assist judges regarding the use of adjustments that may be relevant at the time of empanelment, after the jury has been selected and at the commencement of formal deliberations, to explain the nature of any adjustments that have been made and how they will work in practice.

Statement to counsel before empanelment

- 12.89 It would be helpful for the judge to give a very brief statement to counsel and the accused that there is a potential juror from the subject groups in the panel and that adjustments have been made to enable them to serve. This should occur before the panel is brought into the courtroom. We do not think any other attention needs to be drawn to the potential juror at this point. The purpose of this reform is to shift misconceptions before the exercise of challenges (we also discuss this in Chapter 17).

- 12.90 The Supreme Court notes that current practice is that once the panel is seated in the courtroom, the judge gives a briefing about the trial and other matters. This 'generally includes the estimated length of trial hours required if selected as a juror, and the need to be able to sit in jury seats'. The court suggests that the judge's briefing could 'also include a statement that it is important to be able to understand and assess certain types of evidence in a particular trial. This case statement could be given in all cases or in cases where the Court is aware that the panel includes a person in the subject groups'.⁷¹
- 12.91 The additional statement suggested by the Supreme Court about being able to assess evidence will probably not be necessary because Juries Victoria will have relayed this information to the potential juror much earlier in its discussions with them. The matter may have also already been considered by a judge in a hearing pre-empanelment.

Swearing in jurors and interpreters

- 12.92 If a person from the subject groups is empanelled as a juror, they will be sworn in (like all other jurors). First, however, it will be necessary (in some cases) for the Auslan interpreter or support person to be sworn in. We discuss these oaths/affirmations in Chapters 14 and 15.

Discussion with counsel after the jury is sworn in

- 12.93 The Supreme Court suggested that after the jury is sworn in there may need to be a short break to discuss with counsel the arrangements that will be made for the juror using adjustments. This might include things like 'seating arrangements during the trial, breaks for any support persons such as Auslan interpreters, and possibly the need to adjust how they speak'.⁷²
- 12.94 Information about the use of Auslan interpreters could be shared with counsel at this time. In Chapter 9 we referred to the Recommended National Standards for Working with Interpreters in Courts and Tribunals (RNS) that outline best practice for working with interpreters in the legal system, including the need for breaks, briefing etc.⁷³ The academics who undertook the mock trial study told the Commission that they provided a one-page briefing document for the participants. Briefing notes were provided to lawyers and the police, the judge, interpreters, hearing and non-hearing jurors. Similar information, based on the RNS, could be developed for judges and lawyers.
- 12.95 Information provided to lawyers and the judge before the mock trial covered:⁷⁴
- The presence of two Auslan interpreters, their professional qualifications and obligations of confidentiality.
 - Their role, which would be to interpret faithfully and impartially everything in court during the trial and in the deliberation room during the jury deliberation.
 - How everyone should address questions and remarks directly to the person they are speaking to, including deaf jurors, rather than to the interpreters who would interpret what was said.
 - The complexity of interpreting and that interpreting accurately does not mean interpreting word-for-word or literally.
 - That if the interpreters required clarification of concepts or to explain a translation difficulty, they would seek permission of the judge by raising their hand.
 - That the deaf jurors could ask for clarifications through the interpreters by raising their hand.

⁷¹ Submission 11 (Supreme Court of Victoria).

⁷² Ibid.

⁷³ Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022).

⁷⁴ Information provided by Sandra Hale to Victorian Law Reform Commission, 25 February 2021; Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016): Extracts from 'Briefing for Judge' for mock trial, held 16–17 July 2014.

- The need for lawyers to:
 - phrase questions clearly and ask one question at a time
 - avoid colloquialisms, puns, jokes and overly technical language
 - give copies of written materials they planned to read from to the interpreters because it is challenging to interpret what someone else is reading aloud without the benefit of the text.
- When the interpreters would take breaks, where they would sit, and how they would take turns interpreting every twenty minutes.

12.96 The Supreme Court also recommended that the court would need to discuss with counsel whether the trial will take longer because of the use of interpreters. If the additional time is significant 'the Court may need to [subsequently] confirm with jurors that there are no issues with the new estimate'.⁷⁵ The Commission does not believe that this would be the best time to discuss this issue. Instead, it would be preferable for the trial judge to take into account that there may be a juror using adjustments on the trial and to factor this into the trial duration estimate that is provided to the panel before empanelment occurs.

Directions to the court before the trial starts

12.97 Some members of the jury may not have met or worked with people who are deaf, hard of hearing, blind or have low vision before. Brent Phillips noted that it is probably safe to assume that 'hearing jurors are unlikely to know about the role of an interpreter'.⁷⁶

12.98 The County Court submitted that:

directions may need to be formulated in order to be provided to the jury at the commencement of trial and before they retire to consider the verdict. The directions could encompass, for example, how the person will be assisted, the role of the person who is assisting, and the prohibition on the supporter engaging with the remainder of the jury.⁷⁷

12.99 Associate Professors Bruce Baer Arnold and Wendy Bonython suggested that training material provided to jurors could incorporate information about jury service with adjustments. They also submitted that a judge should inform the court about the use of adjustments. They note that 'we specifically refer to a judge because that introduction signals the seriousness of jury participation as part of the justice system and that disrespect of a supported juror is abhorrent. Such signalling serves to educate the broader community ...'.⁷⁸

12.100 When the jury is brought back into the courtroom, the judge usually provides a general housekeeping briefing. This includes things like the need to be punctual for jury service, to direct questions to the tipstaff, where tea and coffee will be provided, and not to talk about the trial to non-jurors.

12.101 The Supreme Court suggested that the trial judge should explain the following in addition to the usual housekeeping matters:

- the adjustments that will be used during the trial
- seating arrangements
- matters relating to Auslan interpreters if they are present
- that if jurors have any concerns about the adjustments, they can raise them with the court.⁷⁹

⁷⁵ Submission 11 (Supreme Court of Victoria).

⁷⁶ Consultation 8 (Brent Phillips).

⁷⁷ Submission 14 (County Court of Victoria).

⁷⁸ Submission 4 (Baer Arnold & Bonython).

⁷⁹ Submission 11 (Supreme Court of Victoria).

- 12.102 All the Auslan service providers and the mock trial academics suggested that it is important that the court is provided with information about the role of the Auslan interpreter and how they work.⁸⁰ This would 'help to normalise things, so people don't get caught up or distracted wondering who the interpreter is'.⁸¹ The mock trial academics point out that this would not be a significant interruption to the trial and it would be good for the parties, jurors and lawyers and good practice generally.⁸² NAATI also identified that 'an Auslan interpreter needs to have confidence that others understand' their role.⁸³
- 12.103 At the start of proceedings, and before an interpreter commences interpreting, judges should introduce the interpreter and explain their role as an officer of the court.⁸⁴ This information would be most helpful if it could be reduced into a one-page briefing. The mock trial academics noted that 'there is benefit in ensuring everyone in the court has a copy of that briefing to understand the role of interpreters'.⁸⁵ They suggested that the key information to pass on about working with interpreters is information about:
- how they work
 - the need for two interpreters
 - the need for people speaking in court to take turns and not to speak over each other
 - the impartial role of the interpreter
 - not to ask the interpreter for their opinion during deliberations.⁸⁶
- 12.104 Some of the information that could be provided to the jurors could be modelled on the information prepared for the mock trial. As well as covering the information provided to lawyers and judges, summarised earlier, this covered how the foreperson would agree strategies with the interpreters to manage the flow of the conversation and minimise overlapping speech.⁸⁷

Directions to the jury before final deliberations

- 12.105 The Commission suggests a simple direction be given by the judge to the jury, before jury deliberations formally commence, if a support person or Auslan interpreters are going to enter the jury room. The Commission acknowledges that the jury will be discussing the case and meeting in the jury room from very early on in the trial process. This means that this direction may simply reinforce or remind jurors of previous advice outlined above. In relation to Auslan interpreters, this briefing should remind jurors that the Auslan interpreter has sworn an oath to the court to maintain confidentiality and not be involved in jury deliberations. Jurors should not seek an interpreter's opinion or interact with an interpreter separately to the juror from the subject groups. A juror should raise any concerns about the interpreter's conduct with the judge through the foreperson.
- 12.106 Before a jury formally deliberates, a judge is required to provide directions to the jury pursuant to the *Jury Directions Act 2015* (Vic) and as outlined, for example, in the *Criminal Charge Book*.⁸⁸ The recommended direction should be included in the relevant bench book.

80 Consultations 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)), 13 (National Accreditation Authority for Translators and Interpreters (NAATI)); Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

81 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

82 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

83 Consultation 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

84 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022), 19 [17.5].

85 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

86 Ibid.

87 Information provided by Sandra Hale to Victorian Law Reform Commission, 25 February 2021; Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016): Extracts from 'Hearing Juror Protocol' for mock trial, held 16–17 July 2014.

88 *Jury Directions Act 2015* (Vic); Judicial College of Victoria, '1.11 Consolidated Preliminary Directions', *Victorian Criminal Charge Book* (Online Manual, 16 May 2019) <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>. See also Judicial College of Victoria, *Civil Juries Charge Book* (Online Manual, 2014) <<https://www.judicialcollege.vic.edu.au/eManuals/CJCB/index.htm#45310.htm>>.

Recommendations

11. Juries Victoria should coordinate the provision of reasonable adjustments.
12. Juries Victoria should change the juror questionnaire (juror eligibility form) and the juror summons form to request information about the need for adjustments for a person who is deaf, hard of hearing, blind or has low vision.
13. Juries Victoria should contact a potential juror from the subject groups to discuss their needs and to offer a pre-empanelment visit to the court.
14. To assist the Juries Commissioner to make a recommendation to the court about the provision of reasonable adjustments, judges' chambers shall provide Juries Victoria with additional information about evidence that is likely to be material to the outcome of the trial that might make it difficult for the potential juror to serve on that trial.
15. The Juries Commissioner must make a recommendation to the Court about the provision of reasonable adjustments. This should be done as early as possible, preferably before the date the juror is required to attend court in response to their summons.
16. The Juries Act should be amended to give the Juries Commissioner a new power to hold a person out of a ballot for a panel for a trial if the Juries Commissioner determines that the trial is not suitable for the potential juror. This decision should be appealable under section 10 of the Juries Act to either the County Court or the Supreme Court.
17. The final decision about whether a person in the subject groups can serve on a jury should be made by a trial judge on the day of empanelment.
18. The County and Supreme Courts should develop guidance and suggested standard directions to use at the time of empanelment, after the jury has been selected, and at the commencement of formal deliberations, to explain the nature of any adjustments that have been made and how they will work.

CHAPTER 13

Adjustments to enable jury service

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13. Adjustments to enable jury service

The public will only know what blind/visually impaired people are capable of when we show them what we can do. If the public don't have any contact with blind/visually impaired people, they don't know what tools are available to help blind people undertake the same tasks as sighted people. I always say: 'If you want to know how things work [for a blind person], ask me'.¹
— Participant in the Blind Citizens Australia consultation

Overview

- For people who are deaf or hard of hearing, adjustments to enable jury service may include technology such as hearing loops or captioning, and Auslan interpreters.
- People who are blind or have low vision may require reading assistance software or Braille materials, materials provided in accessible formats and a support person.
- Using adjustments may involve changing the way that courtrooms are organised and particular trials are run.
- It may be easier for jurors to bring their own technology to court, but in such cases there are issues of confidentiality and security to be considered.
- Everyone's experience of disability is unique. Therefore, flexibility will be needed about the provision of reasonable adjustments for jury service.

What types of adjustments might people use to serve on a jury?

- 13.1 The United Nations Convention on the Rights of Persons with Disabilities (CRPD) defines 'reasonable accommodations' (which we call 'reasonable adjustments' in this report) as:
- necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.²
- 13.2 In the context of jury duty, accessibility tools are needed to ensure that a person can understand and follow proceedings, navigate the courtroom and building, and communicate effectively with their fellow jurors. Potential jurors may need to use more than one type of adjustment.

¹ Consultation 1 (Blind Citizens Australia).

² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into Force 3 May 2008) art 2.

- 13.3 As noted in Chapter 11 it will be important for Juries Victoria to establish an ongoing relationship with peak disability advocacy organisations to discuss available adjustments and keep in touch with changes in technology.

Adjustments for people who are deaf or hard of hearing

- 13.4 People who are deaf or hard of hearing already use a range of adjustments to participate in Victorian court proceedings as witnesses and parties. Some of these, as well as additional adjustments that may be useful for jury service, are outlined below.

Lip-reading

- 13.5 Many people who are deaf or hard of hearing use lip-reading as a tool to understand speech. To lip-read in court the juror would need a clear line of sight and might also want to make use of technology to view evidence and court proceedings at a close range.

Auslan interpreters

- 13.6 Australian Sign Language (Auslan) is a visual language that enables deaf and hard of hearing people to communicate and participate in society.³ There is no one universal sign language. Auslan interpreters interpret everything that is said in English into Auslan, and anything that is signed in Auslan into English. Chapter 14 makes recommendations about Auslan interpreters working with jurors.

Hearing loops

- 13.7 Hearing loops enable people who wear hearing aids to hear more clearly by taking a sound and transferring it directly into a hearing aid, without background noise interference or distortion.⁴
- 13.8 Hearing loops are used by Australian courts, including the County Court and Supreme Court in Victoria, though not all Victorian courtrooms are equipped with them.⁵ The Victorian *Disability Access Bench Book* notes that, where hearing loops are not in place, 'judicial officers should consider whether a different courtroom is required'.⁶ Hearing loops are also used in courts in England and Wales, Ireland, New Zealand and the United States.⁷
- 13.9 Not all hearing aids are compatible with all hearing loops.⁸ There can be mismatches between a person's hearing aid and hearing loop technology in a courtroom.⁹ In Chapter 12 we recommended a potential juror be able to visit court ahead of their summons date to discuss their needs. This issue could be tested then.

3 The Victorian Department of Health website explains that: 'Like other sign languages, Auslan is equal in complexity and expression to spoken language and can express nuance, force and subtlety, as well as concrete information. It is not just English conveyed through signs or a manual code, but a distinct visual language': Department of Health (Vic), 'Sign Language—Auslan', *Better Health Channel* (Web Page) <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/sign-language-auslan>; also Consultations 6 (Deaf Victoria and community participants), 8 (Brent Phillips).

4 AMPETRONIC, *All About Induction Loops* (Factsheet, 2019).

5 We were told that the Supreme Court of Victoria has hearing loops in every courtroom but the County Court of Victoria does not: Consultations 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates), 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

6 Judicial College of Victoria, '4.4 Planning—Accessibility Checklist', *Disability Access Bench Book* (Online Manual, 1 December 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

7 Information received from Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021; 'Accessibility', *The Courts Service of Ireland* (Web Page) <<https://www.courts.ie/accessibility>>; Consultations 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States), 15 (Representatives of High Court and District Courts of New Zealand).

8 'Hearing Loops Frequently Asked Questions', *Hearing Link* (Web Page) <<https://www.hearinglink.org/living/loops-equipment/hearing-loops/hearing-loops-frequently-asked-questions/>>.

9 This was raised as an issue by the Jury Commissioner in Monroe County, New York State: Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States). The Jury Commissioner also noted that there are two different types of hearing loops and the courts should consider which one will assist the most people.

Captioning, Communication Access Real Time Translation (CART) and stenographers

- 13.10 Captioning is the display of spoken words as text on a computer screen, mobile device or television. Captions allow viewers to follow the dialogue and the action of a program simultaneously.¹⁰
- 13.11 Captioning can occur in real time, although there is a slight delay.¹¹ Alastair McEwin, who is deaf, told the Commission:
- Captioning is important and the best services are now only a second or two behind the spoken word. It can now occur almost simultaneously ... While it has improved, it is still not perfect, as it relies on the machine getting used to a wide variety of voices.¹²
- 13.12 A participant in our consultation with Deaf Victoria commented:
- Captioning can be a useful tool not just for deaf or hard of hearing jurors. It is important that reputable and high-quality captioning providers are used as auto-generated captions can be inaccurate.¹³
- 13.13 Expression Australia noted that the placement of the captioning screen is important.¹⁴ Placement and line of sight are discussed further below.
- 13.14 Communication Access Real Time Translation (CART)¹⁵ is already used in the Family Court of Australia and the Federal Court of Australia.¹⁶ It is also used in courts in England and Wales and some states of the United States.¹⁷ CART can be combined with an audio component such as a hearing loop, to further improve accessibility.¹⁸
- 13.15 Mr McEwin expressed a preference for the older stenography system because he felt that 'stenographers in the room can hear and sense what is going on, so they are more accurate' than captioning based on voice recognition technology.¹⁹

Special materials and formats of evidence

- 13.16 Transcripts may need to be provided to jurors from the subject groups to aid their understanding of proceedings.

Emerging technological supports

- 13.17 In the consultation paper we described new and emerging technologies, including automated speech recognition, lip-reading devices and sign language translators.²⁰

10 'Captions For Deaf and Hard-of-Hearing Viewers', *National Institute on Deafness and Other Communication Disorders* (Web Page) <<https://www.nidcd.nih.gov/health/captions-deaf-and-hard-hearing-viewers>>.

11 'Captioning and CART', *Hearing Loss Association of America* (Web Page) <<https://www.hearingloss.org/hearing-help/technology/cartcaptioning/>>.

12 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

13 Consultation 6 (Deaf Victoria and community participants).

14 Consultation 5 (Expression Australia).

15 Raul Sanchez, Good Sport Captioning, 'Differentiating CART and Closed Captioning', *Our Blog* (Blog Post, 28 March 2016) <<https://goodsportcaptioning.com/differentiating-cart-and-closed-captioning/>>.

16 Federal Court of Australia and Family Court of Australia, *Service Charter for the Family Court of Australia and the Federal Court of Australia* (Report, 2016) 7; 'Interpreter Policy and Guidelines', *Federal Circuit and Family Court of Australia* (Web Page, 2021) <<https://www.fcfcga.gov.au/policy/interpreter>>.

17 See American Judges Foundation and National Court Reporters Foundation, *Communication Access Realtime Translation (CART) in the Courtroom: Model Guidelines* (Report, 18 September 2002).

18 'Captioning and CART', *Hearing Loss Association of America* (Web Page) <<https://www.hearingloss.org/hearing-help/technology/cartcaptioning/>>.

19 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

20 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 69 [8.25]–[8.28].

Adjustments for people who are blind or have low vision

- 13.18 People who are blind or have low vision use a range of methods and tools to access information. The available technologies are advancing rapidly.
- 13.19 Vision Australia identified two categories of adjustments, environmental and those relating to jury processes, that a person who is blind or has low vision may need in order to serve on a jury. The areas they identified in which supports may be needed are summarised in the box below.

Environmental adjustments

- getting to and from the court building
- navigation of courthouse security
- moving around the courtroom
- moving between the courtroom and the jury room
- accessing meals
- using a Guide Dog to navigate
- jury views of places or objects, as ordered by a judge²¹—assistance from court-appointed support person to navigate and describe the site

Jury service adjustments

- knowledge of who is in the courtroom, where they are positioned and their roles
- accessing written evidence—extra time to convert and read material and/or to configure adaptive technology
- accessing physical evidence—assistance from a court-appointed support person to describe the item
- accessing video or photographic evidence—assistance from a court-appointed person to describe video or photographic evidence (if the case is not deemed to be inherently visual in nature)
- contacting the judge to ask a question or raise an issue or seek clarification—through a court-appointed support person or jury foreman depending on the context
- making notes of the evidence—permission to use equipment such as electronic note-takers and document readers. Court would arrange charging points, Wi-Fi access, and any other facilities required to access documents. Assistance from a court-appointed support person to read any information that is present during jury deliberations in a written or inaccessible form
- access to and accessible transcript of proceedings—court guidelines about how to make transcript accessible and navigable transcripts.²²

²¹ The *Evidence Act 2008* (Vic) s 53 provides that a 'judge may, on application, order that a demonstration, experiment or inspection be held'. This is known as a 'view'. The *Juries Act 2000* (Vic) s 45 also provides that: 'If, during a civil trial, the judge considers it desirable for the jury to view a particular place or object, the judge may order a view'. See also 'Jury Trial and Verdict', *NSW Government, Communities & Justice* (Web Page, 29 June 2020) <<https://courts.nsw.gov.au/courts-and-tribunals/for-jurors/for-individuals-/jury-trial-verdict.html>>.

²² See Submission 10 (Vision Australia) Appendix.

Support persons

- 13.20 A prospective juror who is blind or has low vision may need the assistance of a support person to help them to serve as a juror.²³ Vision Australia identifies two roles for that person:
- assisting the prospective juror to navigate the courtroom
 - making evidence accessible.²⁴
- 13.21 In Chapter 15 the Commission recommends a new role for an accessibility officer to help a prospective juror navigate the court building during the jury selection process and the trial. The Commission also recommends that the *Juries Act 2000* (Vic) allow the appointment of a support person as an adjustment for a potential juror in the trial and in the jury room.

Special materials and format of evidence

- 13.22 Documents may be required in alternative or accessible formats, such as in a larger font, a plain typeface with spacing between the words, or printed on tinted paper.²⁵ Where a person wishes to use reading enhancement software, documents should be provided in Microsoft Word format rather than PDF.²⁶
- 13.23 Audio copies of the transcript may also be useful for jurors who are blind or have low vision. One survey respondent noted:
- I understand that all hearings are transcribed and on many occasions I have needed an audio copy for a person I represent so that I can present the case to the best of my ability, however in this situation I have either had to pay for or request a fee waiver for the audio copy.²⁷
- 13.24 Some people may find it useful for electronic documents to be displayed on a black background with white text. This is easier for a person who has low vision to read because the text is less glary, resulting in less fatigue.²⁸

Reading assistance software

- 13.25 Screen-reading programs translate the written text displayed on a screen to a voice synthesiser which reproduces the text as speech.²⁹ Popular screen readers include the Jaws Screen Reader, which provides speech and Braille output for most computer applications.³⁰ Another is Zoom Text, which 'enlarges and enhances everything on [a] computer screen, echoes your typing and essential program activity, and automatically reads documents, web pages, email'.³¹ Apple VoiceOver, an application on iPhones, may also be useful.³² These programs can be used with headsets.

Magnifiers

- 13.26 Magnifiers may be useful for people who have low vision.³³ They enlarge images and can be manual or electronic.³⁴

23 Consultation 1 (Blind Citizens Australia).

24 Submission 10 (Vision Australia).

25 Judicial College UK, *Equal Treatment Bench Book* (Manual, February 2021) 460 <<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>>; Consultations 1 (Blind Citizens Australia), 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

26 Judicial College UK, *Equal Treatment Bench Book* (Manual, February 2021) 460 <<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>>; Consultation 1 (Blind Citizens Australia).

27 Online Survey (Response 1).

28 Consultation 1 (Blind Citizens Australia).

29 'Computer Screen Readers', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/computer-screen-readers>>.

30 'JAWS', *Freedom Scientific* (Web Page) <<https://www.freedomscientific.com/Products/software/JAWS/>>; Consultation 1 (Blind Citizens Australia).

31 'ZoomText Magnifier/Reader', *ZoomText* (Web Page) <<https://www.zoomtext.com/products/zoomtext-magnifierreader/>>.

32 Consultation 1 (Blind Citizens Australia).

33 Ibid.

34 'Magnifiers', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/magnifiers>>.

- 13.27 Electronic magnifiers come in many different varieties. Some have a camera system that displays a magnified image on a monitor. Others are hand-held and portable. Electronic magnifiers can be mounted on eye glasses.³⁵
- 13.28 CCTV magnifiers have a camera on a frame displaying a magnified image on a monitor. Text and images can be enlarged and the contrast can be altered to brighten images. Some CCTV magnifiers include speech output so that a person can hear the text being read as it is displayed on the monitor.³⁶ CCTV of court proceedings may also assist with lip-reading.

Braille material

- 13.29 Braille embossers print Braille from a computer by punching dots onto paper.³⁷ Braille embossers are accompanied by translation software that can translate documents in word processing programs into Braille.³⁸
- 13.30 Electronic or refreshable Braille displays are tactile devices that can be connected to computers or smart devices through Bluetooth. They enable the user to read the contents of a screen through Braille. Braille displays electronically raise and lower different combinations of pins in Braille cells, and the display changes continuously as the user moves their cursor around on the screen.³⁹

Mobility canes and assistance animals

- 13.31 In Chapter 11 we canvass concerns about the accessibility of court buildings and courtrooms in Victoria. We recommend that the courts improve accessibility across Melbourne and regional Victoria to enable people from the subject groups to serve as jurors.
- 13.32 Blind jurors may rely on mobility tools such as mobility canes, which come in different forms:
- Long canes enable a person who is blind or has low vision to detect all obstacles and hazards within their path of travel.
 - Support canes can aid balance and provide physical support.
 - White identification canes indicate to others that a person has low vision.⁴⁰
- 13.33 Prospective jurors who are blind may also require an assistance animal to navigate the courtroom, jury room and court building. Under the *Equal Opportunity Act 2010* (Vic), it is against the law to discriminate against a person because they have an assistance dog.⁴¹
- 13.34 The *Disability Access Bench Book* states that where assistance animals accompany court users with disabilities there will be a need to allow water and toilet breaks.⁴² This would also apply in jury duty. The Office of Public Prosecutions (OPP) told us that assistance animals are routinely accommodated for witnesses or victims.⁴³ The courts are therefore accustomed to them.

35 'Guide to Buying Low Vision Magnifiers', *All About Vision* (Web Page) <<https://www.allaboutvision.com/buysmart/magnifiers.htm>>.

36 Brian Gerritsen, 'Electronic Magnifiers and Magnifying Systems', *VisionAware* (Web Page) <<https://visionaware.org/everyday-living/helpful-products/overview-of-low-vision-devices/electronic-magnifiers/>>.

37 'Braille', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/braille>>; Consultation 7 (Vision Australia).

38 'Braille', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/braille>>.

39 'Library Guide: Blind/Visual Impairment: Common Assistive Technologies', *Illinois Library* (Web Page) <<https://guides.library.illinois.edu/c.php?g=526852&p=3602299>>.

40 'Accessible Equipment', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/living-independently/accessible-equipment>>.

41 *Equal Opportunity Act 2010* (Vic) s 7. See also *Domestic Animals Act 1994* (Vic) s 7(4).

42 Judicial College of Victoria, *Disability Access Bench Book* (Online Manual, 2016) [4.4] <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

43 Consultation 16 (Office of Public Prosecutions Victoria).

Emerging technology

- 13.35 New descriptive applications are emerging to assist people who are blind or have low vision. These may serve a supportive function for jurors in the future.⁴⁴

Possible changes to courtroom organisation and how a trial is run

- 13.36 There may need to be changes to courtroom layout, the jury room and trial processes to facilitate the use of adjustments. In Chapters 12 and 18 we make recommendations about anticipating and preparing for these adjustments.
- 13.37 In Chapter 12 we recommend that Juries Victoria and the court consider possible adjustments and changes to courtroom layout in a pre-empanelment court visit. Training materials for the judiciary should include information about line of sight, with diagrams. This should ensure that the court is prepared and any logistical issues have been addressed ahead of time, allowing everything to run smoothly for the court, the potential juror and interpreter. Victorian Criminal Bar Association consultees noted that a court policy on these issues would mean that a 'judge doesn't need to make those decisions on the day'.⁴⁵

Courtroom organisation

- 13.38 Vision Australia told the Commission that in 'most cases only small adjustments would be required', providing examples:
- ensuring that there is sufficient space to accommodate a Seeing Eye dog if the blind or low vision juror uses one, or seating a low vision juror in a place in the courtroom or jury room where they are not negatively impacted by glare or bright light.⁴⁶
- 13.39 Similarly, Alastair McEwin noted that there 'is an assumption that we need to make huge expensive changes to provide access for people with disabilities. But this is not necessarily true'.⁴⁷
- 13.40 The adjustments undertaken for the benefit of jurors in the subject groups may also improve access for all court users. Associate Professors Bruce Baer Arnold and Wendy Bonython submitted that:
- Our scrutiny of courtrooms in locations in Melbourne, regional NSW, Sydney and the ACT suggests that many people *without* hearing/vision difficulties would welcome redesign to assist them in following what takes place in court and in jury rooms.⁴⁸
- 13.41 The County Court noted that a person requiring an assistance dog 'could be seated appropriately at the end of the jury box closest to the jury room door'.⁴⁹ The Court told the Commission that it 'is open to adjusting lighting to an appropriate level to assist with lip-reading, while remaining comfortable for all court users'.⁵⁰ Sometimes it may be necessary to move positions as the light changes,⁵¹ or for a juror to be seated near the witness stand.⁵² This may mean that particular trials have to be heard in certain courtrooms with the right configuration.

44 See generally Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 72 [8.47].

45 Consultation 4 (Victorian Criminal Bar Association).

46 Submission 10 (Vision Australia).

47 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

48 Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

49 Submission 14 (County Court of Victoria).

50 Submission 14 (County Court of Victoria).

51 Judicial College UK, *Equal Treatment Bench Book* (Manual, February 2021) 422 <<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>>.

52 Victorian Law Reform Commission, *Inclusive Juries—Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 31 [4.25], citing Ministry of Justice (NZ), 'Disability Support', *Jury Service* (Web Page, 18 August 2020) <<https://www.justice.govt.nz/courts/jury-service/disability-support/>>. We note that this web page no longer appears online.

13.42 Special adjustments to the courtroom layout and court procedures may be required to allow Auslan interpreters to work effectively. The key issues that may arise are:

- line of sight for the deaf juror⁵³
- seating position for the interpreters⁵⁴
- need for regular breaks⁵⁵
- quality of acoustics.⁵⁶

13.43 The Jury Commissioner, New York State Courts in Rochester, Monroe County, United States, told us that line of sight and courtroom modifications are common:

sometimes courtrooms need to be re-arranged to accommodate people who are deaf/hard of hearing so that they can see the interpreter (and potentially lip read as well). This can be a tricky process, giving rise to conflicts, as judges like to control their courtroom, but interpreters like to proactively assert the interests of their clients.⁵⁷

Trial adjustments

13.44 Some adjustments to the conduct of the trial may be required to facilitate access for people in the subject groups. These adjustments might include allowing extra time for jurors in the subject groups to read material, asking counsel to think about the way that they ask questions, or reading exhibit material out in court. In Chapter 14 we consider some of the challenges that arise for Auslan interpreters in court.

13.45 Blind Citizens Australia noted that 'Blind/visually impaired jurors will need to know what tools they will need to assist them in advance'. Further, Blind Citizens Australia commented that:

Some blind people are less technically savvy. The Commission should keep in mind the broad spectrum of people who are blind and with low vision and that people need to be:

- prewarned about what they will be expected to do
- given some extra time to undertake tasks.⁵⁸

13.46 Brent Phillips told us that:

It would also be useful if evidentiary documents can be provided to a deaf person earlier. They may need more time to read/comprehend the documents because English may not be their first language. Deaf people are often given an extra 15 minutes reading time in University assessments.⁵⁹

13.47 The County Court suggested that providing judicial instructions in writing may assist jurors who are deaf or hard of hearing, noting that:

The Court does not foresee any adverse impact of this adjustment and the Court is moving toward updating the Jury Guide for civil and criminal trials which contains many of the instructions and directions in writing. Written instructions may also assist other members of the jury who were not able to fully understand or remember the direction themselves.⁶⁰

53 Consultations 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)), 5 (Expression Australia); Consultation 8 (Brent Phillips), 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW), 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

54 An ASLIA consultation participant who is an Auslan interpreter noted that when interpreting in court, she 'is usually placed at the front of the courtroom, or positioned in a suitable space, depending on the layout of the courtroom. Usually, if at all practicable, interpreters do not have their back to the judge': Consultation 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)). Also consultations 8 (Brent Phillips), 19 (Australian Institute of Interpreters and Translators (AUSIT)).

55 Consultations 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)), 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

56 Consultations 19 (Australian Institute of Interpreters and Translators (AUSIT)), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

57 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

58 Consultation 1 (Blind Citizens Australia).

59 Consultation 8 (Brent Phillips). Expression Australia made similar comments about the need for extra time to analyse the evidence: Consultation 5 (Expression Australia).

60 Submission 14 (County Court of Victoria).

Court documents in different formats

- 13.48 Sometimes jurors in the subject groups may have—as a result of adjustments—materials in the jury room which other jurors would not normally have, for example digital or hard copy versions of evidence and written jury directions. In this situation, the judge may need to remind the other jurors that they are also free to share and discuss that material. These adjustments will offer benefits to all jurors in the trial in the way that universal design principles aim to make spaces, policies, and programs inclusive and accessible to all people beyond people with disabilities.⁶¹

Bringing personal technology to court

- 13.49 Some community members told the Commission that it would be helpful if they could bring their own technology to court. Vision Australia told us that:

Because there are many combinations and configurations of technology used by people who are blind or have low vision, we think that it will in most cases be preferable for jurors to use their own equipment rather than relying on equipment provided by the court.⁶²

- 13.50 Vision Australia highlighted that screen-reading programs are regularly updated. Users ensure that this is done regularly, however it was suggested that this might be more difficult for the court to do.⁶³ The courts might not be as up to date with technological advancements.

- 13.51 Blind Citizens Australia commented that:

It might be helpful if a juror could bring their own laptop [with the necessary programs on it] and read off that. If that is not possible people might want to bring their own keyboards that they are familiar with. This would mean that it would take less time to get used to technology that was the Court's.⁶⁴

- 13.52 The Youth Disability Advocacy Service similarly suggested that young people from the subject groups should be allowed to bring their own assistive technology to court.⁶⁵

The Courts have confidentiality concerns

- 13.53 The Commission understands that it has become much easier for parties to use their own technology in the court setting than in previous years. This has been developing with greater use of electronic trials. The courts have adapted again during the coronavirus (COVID-19) lockdowns.⁶⁶
- 13.54 However, confidentiality concerns may arise with technology that can record and play back information. County Court consultees suggested it could be problematic from a confidentiality perspective for people to bring their own support technology to Court. They noted: 'Phones are removed from jurors when they deliberate so that they cannot communicate externally'.⁶⁷

61 'Universal design' is defined in the Victorian State Disability Plan as: 'Making spaces, policies and programs that are inclusive, accessible and can be used independently by all people'. The implementation of 'universal design' is one of six systemic reforms outlined in the Victorian State Disability Plan: Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022) 60, 24, 29. See also: 'Accessible Communications and Universal Design', VIC.GOV.AU (Web Page) <<https://www.vic.gov.au/state-disability-plan/systemic-reform-commitments-actions-and-accountability/accessible>>.

62 Submission 10 (Vision Australia).

63 Consultation 7 (Vision Australia).

64 Consultation 1 (Blind Citizens Australia).

65 Submission 3 (Youth Disability Advocacy Service).

66 'Virtual Hearings and Trials', *County Court Victoria* (Web Page, 26 April 2022) <<https://www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials>>.

67 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

What happens elsewhere?

- 13.55 In Monroe County, United States, where people with disabilities regularly serve on juries, the Jury Commissioner provides technology for all jurors who require it. Only court-provided technology can be used for official proceedings. Jurors are not allowed to use phones in the deliberation room.⁶⁸

What is the best solution for Victoria?

- 13.56 The Commission's view is that, in general, Juries Victoria and the courts should provide the technological adjustments to enable people in the subject groups to serve as jurors. However, some exceptions may apply, depending on the type of technology. For example, a physical tool like a Braille note taker, Braille keyboard or other modified keyboard could be brought by an individual juror with the approval of the trial judge.
- 13.57 Juries Victoria should discuss technology with the potential juror to ensure that it can be set up to accommodate their individual needs. Juries Victoria should liaise with In Court Technology (ICT) to see what is possible. Further, as one submission noted:
- If the court provides adaptive technology for use during the trial then the juror needs time prior to the trial to adjust settings to their personal preferences and to familiarise themselves with it.⁶⁹
- 13.58 Over time the court should develop a list of technologies that are suitable to bring from home that are not capable of external communication or being pre-loaded with data. An example might be a modified keyboard, or a Braille note taker.

Talking to people in the subject groups about reasonable adjustments

- 13.59 People who are deaf, hard of hearing, blind or have low vision do not form one homogeneous group.⁷⁰ Everyone's circumstances differ, and people experience disability differently.⁷¹ Flexibility will be needed about the provision of adjustments for jury service.
- 13.60 People in the subject groups access information and communicate with their families, colleagues and the broader community every day in a wide range of contexts. They are best placed to tell Juries Victoria and the courts what reasonable adjustments they will require to undertake jury service.
- 13.61 Alastair McEwin noted that the 'key is that the court works with the deaf person to support their needs. The individual will usually have a solution to any issues that arise'.⁷²

68 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

69 Submission 5 (Name withheld).

70 The 'diversity of persons with disabilities' is recognised in the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Preamble.

71 Consultations 6 (Deaf Victoria and community participants), 7 (Vision Australia), 8 (Brent Phillips), 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity), 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

72 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

CHAPTER 14

Auslan interpreters and jury service

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14. Auslan interpreters and jury service

Highly competent professional and ethical interpreters were able to effectively remove the communication barrier.¹—Observation from academics who ran a mock trial with a deaf juror

Overview

- This chapter considers the role of Auslan interpreters in facilitating jury service for people who are deaf. We start by addressing limitations in the Juries Act that might prevent their involvement in jury work.
- We also explore the training and certification requirements for Auslan interpreters who work in a court setting.
- Auslan interpreters who work with jurors should be required to complete additional training that specifically relates to jury work and sign up to standards and a code of conduct.
- They should provide an oath or affirmation to the court regarding their duty to the court and obligation to maintain the confidentiality of jury deliberations.
- Penalties should apply for breach of duties and are discussed in the next chapter.

The role of an Auslan interpreter

- 14.1 Auslan interpreters will facilitate communication between a deaf juror and the other people involved in a trial, including the judge, lawyers, accused, parties, witnesses and other jurors. To do this, Auslan interpreters will interpret everything that is said in English into Auslan, and anything that is signed in Auslan into English.

Ability to communicate in English

- 14.2 Schedule 2(3) of the *Juries Act 2000* (Vic) renders certain people ineligible for jury service, including a person who:
- (a) has a physical disability that renders the person incapable of performing the duties of jury service
 - (f) is unable to communicate in or understand the English language adequately
- 14.3 In Chapter 11 we recommended that schedule 2(3)(a) should not apply if the court determines that reasonable adjustments could be provided to enable a person who is deaf, hard of hearing, blind or has low vision to perform jury duty.

¹ Conclusion reached from the mock trial study conducted in 2014: Sandra Hale et al, 'Deaf Citizens as Jurors in Australian Courts: Participating via Professional Interpreters' (2017) 24(2) *International Journal of Speech Language and the Law* 151, 170.

- 14.4 Schedule 2(3)(f) should also be amended to reflect that a deaf juror using an Auslan interpreter, who may not be able to communicate in English but can understand it, is nonetheless competent to serve on a jury. This change was supported in submissions by Associate Professors Bruce Baer Arnold and Wendy Bonython, the Law Institute of Victoria (LIV), and Madison.²
- 14.5 The ability to understand or communicate in English is fundamental to being a juror. County Court consultees stressed that 'English is the language of the Court' and that 'any juror needs to be fluent in the language of the court'.³ As they put it, 'Any person regardless of disability, should not serve if they cannot understand English. [...] This is a screening test for jury selection'.⁴ In practice, a deaf juror is likely to be given trial transcripts in English, and a blind juror will be given voice recordings in English.
- 14.6 The Commission is aware that deaf people 'have a variety of literacy and life experiences just like the broader community'.⁵ In Chapter 3 we noted that some people who are deaf do not understand English or Auslan and may work with Deaf Interpreters to communicate with others.⁶
- 14.7 This inquiry does not consider whether people who do not understand English should be allowed to serve. That question is out of scope for us (see Chapter 1 and our terms of reference).
- 14.8 We note that in New Zealand sign language is recognised as an official language and there is a legal right to use New Zealand Sign Language in legal proceedings.⁷ However, the New Zealand Juries Act still enables a judge to cancel a summons if satisfied that the person cannot perform their role effectively as a juror because of disability or because they cannot understand or communicate in English.⁸
- 14.9 Because there are different levels of English skills in the deaf community,⁹ any information about serving on a jury provided by Juries Victoria and the courts should make it clear that a good grasp of English is still required.

Recommendations

19. The communication requirement in schedule 2(3)(f) of the Juries Act should be modified so that the requirement to communicate in English does not apply if a juror can communicate in Auslan.
20. Juries Victoria and the courts should make it clear in public information about the new laws that the ability to understand English continues to be a requirement for jury service.

2 Submissions 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)), 7 (Law Institute of Victoria), 9 (Madison).

3 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

4 Ibid.

5 Consultation 8 (Brent Phillips).

6 William Hewitt, *Court Interpretation: Model Guides for the Policy and Practice in the State Courts* (Report No 167, National Center for State Courts, 1995) 161. See also Office for Disability Issues, 'Some Differences in Deaf People Using Interpreters', *New Zealand Office for Disability Issues* (Web Page) <<https://www.odi.govt.nz/nzsl/tools-and-resources/some-differences-in-deaf-people-using-interpreters/>>. See Chapter 3.

7 *Sign Language Act 2006* (NZ) ss 6, 7. Note that the right in section 7 enables New Zealand Sign Language to be used—if it is their first or preferred language—by any member of the court, any party or witness, any counsel, and any other person with leave of the presiding officer.

8 *Juries Act 1981* (NZ) s 16AA.

9 Consultation 8 (Brent Phillips).

Recommended National Standards for Working with Interpreters in Courts and Tribunals

- 14.10 In Chapter 9 we referred to the Recommended National Standards for Working with Interpreters in Courts and Tribunals (RNS) that apply to Auslan interpreters in court. The RNS provide a guide for the courts, judicial officers, interpreters and legal practitioners when providing interpretation in a court setting. They cover practical things like:
- the provision of information to the public about the availability of interpreters
 - training for judicial officers and court staff about the role of an interpreter, assessing the need for an interpreter and how to work with an interpreter
 - the need for adequate funding of interpreting services
 - coordinating the engagement of interpreters, booking systems and notice for bookings
 - support for interpreters—working conditions, remuneration, work space, line of sight, breaks, debriefing and counselling, creating opportunities for feedback
 - engaging qualified interpreters
 - the provision of induction and training for interpreters.¹⁰
- 14.11 The RNS have informed the Commission's recommendations for Auslan interpreters. The standards should be consulted by the courts and Juries Victoria when developing practice standards and training material for Auslan interpreters working with jurors.
- 14.12 Professional development training on the RNS should be provided by the Judicial College of Victoria to encourage judges to be familiar with them and use them.¹¹

Auslan interpreters should work in tandem for jury work

- 14.13 Tandem interpreting involves 'interpreters working in rotation at agreed intervals in order to avoid fatigue over extended periods of time'.¹² Auslan interpreting happens almost simultaneously with that which is spoken. Tandem interpreting avoids the risk of occupational injury.¹³ This approach is standard practice in international courts, as it has been for Auslan interpreters in Australia for many years.¹⁴
- 14.14 The RNS explain the benefits of working in tandem in a court setting:
- 1) Courts can expect to at least double the speed of proceedings if they employ a team working in tandem.
 - 2) Having two interpreters helping each other and checking on each other's performance is also an effective quality assurance mechanism.¹⁵
- 14.15 Juries Victoria should consider whether a third Auslan interpreter might be needed for a longer trial to avoid fatigue or to assist a juror during breaks (discussed below).¹⁶

10 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022).

11 The Judicial College of Victoria has information about the RNS on its website: 'Recommended National Standards for Working with Interpreters in Courts and Tribunals', *Judicial College of Victoria* (Web Page, 28 April 2022) <<https://www.judicialcollege.vic.edu.au/news/recommended-national-standards-working-interpreters-courts-and-tribunals>>.

12 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 88.

13 Ibid 16, Standard 8 [8.5].

14 Ibid 45.

15 Ibid.

16 Consultation 5 (Expression Australia). Also Consultations 6 (Deaf Victoria and community participants), 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

Auslan interpreters should be independent

- 14.16 It is important that Auslan interpreters are independent of the person from the subject groups. Independence is recommended in the RNS:

Lack of impartiality may lead to unfaithful renditions, as the interpreter may filter information to protect the witness, or may improperly use information for personal gain. This may work to the disadvantage of either party, depending on whether or not the court recognises what has occurred. Similarly, while interpreters may be asked to explain their interpreting choices, interpreters cannot be asked to give their own evidence as witnesses relating to the interpreting task which has been undertaken: they must remain impartial.¹⁷

- 14.17 We understand that independence will be a requirement for British Sign Language (BSL) interpreters in England and Wales now that new legislation has been passed to allow them in the jury room. We have been told by Her Majesty's Courts and Tribunal Service (HMCTS) that all interpreters will be supplied by the Ministry of Justice's contracted language service provider, and registered with the National Register of Communication Professionals Working with Deaf and Disabled People, or bodies with equivalent suitable experience.¹⁸ All BSL interpreters will have to meet Ministry of Justice contractual requirements, which include a clearly defined list of qualifications, skills, experience and vetting requirements. In addition, as is the current practice, BSL interpreters will be regularly assessed by the quality assurance provider.¹⁹ HMCTS has suggested 'if for any reason, an interpreter fails to reach the required standard, they will be removed from the register and cannot be re-engaged in this capacity until they have satisfactorily completed another assessment'.²⁰

- 14.18 It is important that all parties understand that interpreting is independent and impartial. The RNS suggests some strategies to assure everyone present that interpreting will occur impartially, for example:

- establishing an interpreting team to reduce fatigue and cross-check each other's renditions
- employing an interpreter from interstate or overseas.²¹

- 14.19 The RNS acknowledge that it can be difficult to obtain complete independence in some circumstances, such as:

there are limited numbers of qualified interpreters in a particular language or dialect ... In such cases, the court should take extra steps to satisfy itself that the arrangement is acceptable to the court and to the parties, and should closely monitor the situation.²²

- 14.20 It is important that interpreters have the appropriate training and qualifications to effectively interpret for the juror. As noted by Alastair McEwin:

a deaf person may want their own interpreter or captioner. However, it is important to ensure that everyone gets the same level of information and quality of access. An interpreter might be known to a deaf person, but they might not be qualified to interpret in court, so they might not be the best person for that job.²³

- 14.21 Service providers often allow deaf people to nominate preferred Auslan interpreters and to specify interpreters they do not want to work with. If possible, this should continue. Ultimately, however, the scheduling needs of the Court and Juries Victoria should overrule any personal preferences. If this means that a person is uncomfortable serving, then that person could apply to have their service deferred. If deferred, the preferred Auslan interpreter might be available at a later date. However, in Chapter 11 we recommend that the new own motion power for the Juries Commissioner to defer

17 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 59.

18 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021.

19 Ibid.

20 Ibid.

21 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 60 <<https://jccd.org.au/publications/>>.

22 Ibid 59.

23 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

service for people in the subject groups should be used sparingly, so there are no guarantees that a particular interpreter would be available. It would be for the Juries Commissioner to determine if a person could be excused from jury service in this situation.

Interpretation should happen over lunch breaks

- 14.22 Recent academic research identified that isolation is a concern for deaf jurors in the United States. Professor Napier and colleagues observed in a case study that 'the interpreter asserted that she needed the time to rest during breaks as she was working all day on her own. This meant that the deaf juror does not interact with the other jurors at all'.²⁴

A deaf juror commented:

As a deaf juror it was a huge positive to have an interpreter, but the huge negative was the behaviour of interpreters (eg refusing to go into the deliberation room on breaks so [the] deaf juror couldn't get to know the other jurors). The interpreter established their role boundaries that were too extreme.²⁵

- 14.23 Similarly, in relation to the mock trial in New South Wales (discussed in Chapter 9) it was observed that:

The deaf juror who was selected to go into the deliberation room reported that they enjoyed the experience of sitting on a jury, however they expressed concern about being left alone at lunchtime. (This also happens in the US). Without an interpreter at break times the deaf juror felt isolated and excluded from forming a bond with the other jurors, which is essential to support jury deliberations. They would have liked to have been more involved in the conversations that occurred over break times. Instead, the juror relied on asking people to write questions down on paper. This is something the Commission should consider.²⁶

- 14.24 Given these concerns, interpreters should be available to interpret over lunch breaks. This would also ensure that people using Auslan interpreters can participate in jury duty on an equal basis with others.²⁷ This may mean that an additional interpreter needs to be hired for that purpose.

Training and certification requirements for Auslan interpreters

- 14.25 Auslan interpreters are highly trained professionals and the industry is extensively regulated. To become a professional Auslan interpreter, an individual must be certified by the National Accreditation Authority for Translators and Interpreters (NAATI).²⁸ Further, Auslan interpreters must undertake regular professional development training to maintain their certification.²⁹

- 14.26 NAATI advised the Commission that the certification eligibility criteria (required to become eligible to sit a certification test) are as follows:

- minimum training/qualification: Diploma of Interpreting³⁰ or Advanced Diploma of Interpreting³¹ from RMIT³²

24 Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 267.

25 Ibid.

26 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)). Also Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

27 This is in line with the spirit of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1.

28 National Accreditation Authority for Translators and Interpreters, 'How Do I Become a Translator or Interpreter?', NAATI (Web Page, 2021) <<https://www.naati.com.au/become-certified/how-do-i-become-certified/>>. See also National Accreditation Authority for Translators and Interpreters, NAATI (Web Page) <<https://www.naati.com.au/>>.

29 Consultations 13 (National Accreditation Authority for Translators and Interpreters (NAATI)), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)).

30 'Diploma of Interpreting (LOTE-English) PSP50916', RMIT University (Web Page, 2020) <<https://www.rmit.edu.au/study-with-us/levels-of-study/vocational-study/diplomas/diploma-of-interpreting-loteenglish-c5364>>.

31 'Advanced Diploma of Interpreting (LOTE-English)', RMIT University (Web Page) <<https://www.rmit.edu.au/study-with-us/levels-of-study/vocational-study/advanced-diplomas/advanced-diploma-of-interpreting-loteenglish-c6154.html>>.

32 RMIT has the only university course in Victoria currently endorsed by NAATI (for Auslan): Consultation 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

- The Diploma is equivalent to six months of full-time study (eligibility requirement to sit the Certified Provisional Interpreter (CPI) test)
 - The Advanced Diploma is equivalent to one year of full-time study (eligibility requirement to sit the Certified Interpreter (CI) test, which is at a higher level)
 - ethical competency test: testing the person's knowledge of the professional code of conduct and standards
 - cultural competency test: testing the person's social awareness and cultural awareness (of deaf people)
 - demonstrated proficiency in English.³³
- 14.27 The last three elements are built into the RMIT course, so if a person has completed that course, they do not need to complete the ethical or cultural competency tests, or the proficiency in English test separately.³⁴
- 14.28 Once the applicant has demonstrated that they fulfil the eligibility criteria, they can then undertake a NAATI certification test. They will sit for either the CPI level or CI level test, depending on their training and experience. These are skills-based tests consisting of several interpreting tasks including live scenarios with role play. The test is undertaken in Melbourne (for Victorian candidates) and is recorded on video. If the applicant passes the relevant test, they will qualify as either a CPI or a CI.³⁵
- 14.29 Auslan interpreters need to recertify every three years. To recertify, a person must demonstrate they have completed 120 points of professional development (PD) points in four categories:
- 1) skill development and knowledge
 - 2) industry engagement
 - 3) ethics
 - 4) maintenance of language.³⁶

What qualifications do Auslan interpreters need to work in a court setting?

- 14.30 The Australian Sign Language Interpreters Association (ASLIA) and other Auslan interpreter associations advised the Commission that Auslan interpreters who currently undertake work in the courts (for example to interpret for the accused or witnesses) are generally at the certified level (CI). Sometimes a lower accreditation (CPI) may be used in remote areas or in the Magistrates' Court if a CI level interpreter is not available (see discussion of availability issues below).³⁷
- 14.31 NAATI has now introduced a new specialist certification level: Certified Specialist Legal Interpreter (CSLI).³⁸ These are:
- experienced and accomplished interpreters who are experts in interpreting in the legal domain. They have completed training and undertake continuous professional development in specialist legal interpreting.³⁹

33 Ibid.

34 Ibid.

35 Ibid.

36 Consultation 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)); National Accreditation Authority for Translators and Interpreters, *NAATI Recertification Professional Development Catalogue* (Guide, 2018).

37 Consultations 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)).

38 National Accreditation Authority for Translators and Interpreters, 'Certified Specialist Legal Interpreter', NAATI (Web Page, 2021) <<https://www.naati.com.au/become-certified/certification/certified-specialist-legal-interpreter/>>.

39 'Auslan Certified Specialist Legal Interpreter', NAATI *National Accreditation Authority for Translators and Interpreters* (Web Page) <<https://www.naati.com.au/become-certified/certification/auslan-certified-specialist-legal-interpreter/>>.

- 14.32 To qualify, the candidate must pass a practical interpreting test and a knowledge interpreting test with seven key sections:
- legal terminology and general legal knowledge
 - legal systems and processes
 - ethics and the law
 - culture and the law
 - the role of an interpreter in legal contexts
 - advanced interactional management
 - research and preparation.⁴⁰
- 14.33 The CSLI would already hold a CI certification. This specialisation builds on those skills through additional training.⁴¹

Additional training for Auslan interpreters working with jurors

Qualification requirements

- 14.34 Interpreters for jurors should, at minimum, be at the CI level. However, when sufficient time has passed for Auslan interpreters to attain CSLI level, this specialised certification should be required.
- 14.35 Della Goswell told us that quality is just as important as the number of years of experience.⁴² Anyone undertaking the new NAATI training pathway will be capable of undertaking this work without extensive practical experience. For that reason, we do not recommend a mandated minimum number of years of experience for Auslan interpreters for jurors.
- 14.36 When court interpreters are booked through a service provider, sometimes an interpreter with more experience is paired to mentor a more junior interpreter.⁴³ The Commission thinks this is sensible and should continue.

Training for the specific role of working with jurors

- 14.37 Auslan interpreters assisting jurors should undertake a professional development unit to prepare them for jury work.
- 14.38 The need for additional jury-specific training was supported by most consultation participants.⁴⁴ This type of work is unique. It occurs behind closed doors with fewer opportunities to ask questions (unlike interpreting for a medical appointment, for example, where the interpreter can request clarifications if needed).⁴⁵ ASLIA commented:
- Interpreters need to have in-depth linguistic and cultural knowledge, as well as solid legal knowledge. It usually takes years of experience to develop sufficient knowledge of the legal system, in addition to further study in the area.⁴⁶
- 14.39 In their recent study of deaf jurors in Monroe County, New York State, Professor Napier and colleagues emphasised the importance of specialised training for jury work. The researchers identified that this was a theme that 'spanned judges, lawyers, court administrators and deaf consumers'.⁴⁷

⁴⁰ Consultation 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

⁴¹ Ibid.

⁴² Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

⁴³ Consultations 5 (Expression Australia), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

⁴⁴ Consultations 2 (Law Institute of Victoria), 16 (Office of Public Prosecutions Victoria), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

⁴⁵ Consultation 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)).

⁴⁶ Ibid.

⁴⁷ Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 267.

- 14.40 The Commission acknowledges that the court setting poses challenges for Auslan interpreters as it does for other interpreters. Della Goswell referred to some of the complexities that can arise in a general court context where witnesses and parties use Auslan interpreters. Some examples she referred to included:⁴⁸
- Barristers sometimes use double negatives in questioning. Because Auslan presents visual actions, interpreters have to translate these negative actions into positive actions.
 - Barristers sometimes ask questions that have several parts. Interpreters need to ask for questions to be presented one at a time, or to clearly signal that the deaf person's response is to one part of a question only.
 - It can be difficult to translate an action or spatial relationship into Auslan.⁴⁹
- 14.41 Goswell also noted that continuity of communication choices among Auslan interpreters is important. Sometimes a new interpreter will use a different sign variant or representation of something that has been discussed and established previously, causing confusion.⁵⁰
- 14.42 Because of the extensive training and certification requirements that already exist for Auslan interpreters, the Commission does not believe that additional training for this role should be onerous. Auslan interpreters for jurors will need to understand the unique characteristics of the role, including:
- knowledge of court processes
 - understanding legal language
 - understanding their duties to the court
 - only answering questions asked of the juror
 - anticipating what might happen in a deliberation process (such as what happens at lunch)
 - what to do if the Auslan interpreter has questions about the process or is concerned that the juror is not understanding
 - what to do if the juror (or another juror) asks them questions about the trial or tries to discuss the verdict with the interpreter.
- 14.43 Training should also cover the role of a foreperson as a conduit between the interpreter and judge, for issues arising other than in court. The interpreter and the juror should be aware of the role of the foreperson if either of them have questions for the judge.⁵¹
- 14.44 The specific content of additional training should be developed by Juries Victoria and the courts in consultation with ASLIA and academics who have existing experience in this area.⁵² It would be helpful for NAATI to add a training module about the new role to its new legal specialisation course. NAATI suggested that it would consider this.⁵³

Standards for Auslan interpreters working with jurors

- 14.45 The RNS specify that interpreters are 'officers of the court'. They must be accurate and impartial and these obligations 'override any duty that person may have to any party to the proceedings'.⁵⁴

48 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

49 Ibid.

50 Ibid.

51 We acknowledge that there may be situations where the person from the subject groups is themselves nominated as foreperson. In Chapter 10 we discuss two examples of deaf jurors who were nominated as forepersons in the trials on which they served; one in England and one in New Zealand.

52 See for example recent research that provides recommendations about professional development training for interpreters working with deaf jurors in Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 246.

53 Consultation 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

54 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 63, Standard 18 <<https://jccd.org.au/publications/>>.

- 14.46 The ACT Sheriff advised the Commission that the ACT Supreme Court has developed a number of documents to be used to familiarise Auslan interpreters and support persons with their roles. Those documents include a one-page list of 'standards required by interpreters', induction information and a court interpreters' code of conduct.⁵⁵
- 14.47 The ACT Sheriff plans to send a copy of the standards and code of conduct to the Auslan interpreter before they are to attend court, and require the Auslan interpreter to sign and return the documents before their induction. Induction is likely to occur on the first day of attendance at court, but we were told that the timing of this will depend on the supports that are required.⁵⁶
- 14.48 The ACT standards document for interpreters includes information about punctuality, dress, remuneration, breaks, providing feedback, working in tandem, as well as duties and obligations to:
- Diligently and impartially interpret communication in connection with a court proceeding as accurately and completely as possible
 - Diligently interpret communication between jurors as accurately and completely as possible and not add or include your opinion or beliefs
 - Comply with all directions of the Court
 - Alert the Judge if you become aware of a conflict of interest
 - Requests for repetition, clarification and explanation should be addressed to the Judge only
 - If you need to correct a mistake, address the Judge only
 - If you recognise a potential cross-cultural misunderstanding, or comprehension or cognitive difficulties on the part of the person who you are interpreting for you should seek leave from the Judge to raise the issue
 - You must keep confidential all information acquired, in any form whatsoever, in the course of your engagement or appointment unless that information is or comes into the public domain. This is particularly in relation to jury deliberations. Under no circumstances can jury deliberations be revealed.
 - You are not to take part in discussions between jurors (except to interpret).
 - You are not to convey your belief, opinion or have a say in the decision of the jury.⁵⁷
- 14.49 Similar standards should be developed and provided by Juries Victoria to the Auslan interpreter when a booking is made for their services. Juries Victoria should also contemplate preparing short induction material for Auslan interpreters.
- 14.50 HMCTS advises that it will provide information to the interpreter about their role and responsibilities in the contract, code of conduct and confidentiality agreements they enter into with the contracted suppliers.⁵⁸ Juries Victoria could perhaps provide an induction briefing to a group of Auslan interpreters who are likely to do jury work in the future.

A new code of conduct for Auslan interpreters

Auslan interpreters are already subject to a code of ethics

- 14.51 To hold a NAATI certification (usually necessary to be employed as an interpreter), Auslan interpreters must abide by the Australian Institute of Interpreters and Translators (AUSIT) Code of Ethics and Guidelines for Professional Conduct (Code of Ethics) and the Australian Sign Language Interpreters Association (ASLIA) Code of Ethics.⁵⁹
- 14.52 The RNS also require interpreters working in a court setting to 'familiarise themselves with their responsibilities under the Court Interpreters' Code of Conduct [which is based on the AUSIT code] and be prepared to swear or affirm that they will adhere to that Code'.⁶⁰

A separate code of conduct for jury work

- 14.53 In the Australian Capital Territory (ACT), Auslan interpreters working with jurors will also be required to agree to comply with a code of conduct. The ACT court interpreters' code of conduct is short (two pages) and covers:
- the general duty to the court
 - duty to comply with directions
 - duty of accuracy
 - duty of impartiality
 - duty of competence
 - confidentiality.⁶¹
- 14.54 Despite existing requirements, the Commission thinks it is important to require an Auslan interpreter to sign up to a separate code of conduct in relation to jury work that outlines their role and responsibilities. The courts should develop this code which could be guided by the ACT code and the court interpreters' code of conduct set out in the RNS. Amendments to the Juries Act should be accompanied by regulation that includes accreditation requirements, standards, and a code of conduct for Auslan interpreters.
- 14.55 A code of conduct, new standards and an oath to the court should be sufficient to respond to concerns raised by the LIV:
- In many instances, LIV members have reported their experiences with interpreters in a range of professional settings are that they can stray beyond the confines of their role; venture into providing legal advice, not accurately convey what is being said or needlessly elaborate on statements. Whilst specific training may not be the best way to address this, the LIV recommends part of the affirmation require a pledge to honestly, objectively and accurately interpret to the best of their abilities. Additionally, a fact sheet should be provided to interpreters/supporters and the Judge should reinforce the importance of their role and adhering to their affirmation and the guidance of the fact sheet.⁶²

59 National Accreditation Authority for Translators and Interpreters, 'Step 3 A: Ethical Competency', NAATI (Web Page) <<https://www.naati.com.au/become-certified/how-do-i-become-certified/ethical-competency/>>.

60 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, Second Edition, March 2022) 63, Standard 19 <<https://jccd.org.au/publications/>>.

61 Information provided by ACT Sheriff to Victorian Law Reform Commission, 18 September 2020.

62 Submission 7 (Law Institute of Victoria).

Auslan interpreters should provide an oath or affirmation to the court

- 14.56 Auslan interpreters should provide an oath to the court to perform their duties responsibly and to maintain confidentiality. This is a straightforward exercise. It would directly respond to the High Court decision in *Lyons*, which upheld the 13th person rule and identified that its conclusion was 'reinforced by the absence of provision to administer an oath to an interpreter assisting a juror'.⁶³
- 14.57 The New South Wales Law Reform Commission and the Australian Law Reform Commission have suggested oaths be taken by 'communication assistants', including Auslan interpreters, and stenographers, to ensure confidentiality.⁶⁴
- 14.58 Interpreters working in a court setting would already be familiar with providing an oath to the court, which is required in hearings or in any proceedings where evidence is being interpreted.⁶⁵

The community supports the provision of an oath

- 14.59 The Supreme Court and the County Court both supported an oath/affirmation being made by an Auslan interpreter assisting a deaf juror.⁶⁶ Juries Victoria, the Office of Public Prosecutions, the Victorian Criminal Bar Association, the Law Institute of Victoria and Victoria Legal Aid also supported interpreters taking an oath and being subject to relevant offences for breaches of the oath.⁶⁷
- 14.60 The Commission heard from expert Auslan interpreting organisations that referred to the existing codes of ethics, which include a requirement to maintain confidentiality.⁶⁸ For example, NAATI noted:
- Confidentiality and impartiality are two of the key pillars of both AUSIT and ASLIA's codes of ethics, and, accordingly, of NAATI certification. It is part of prerequisite training/test to learn the details of this code. There is also a minimum amount of professional development that needs to be undertaken regarding ethics for interpreters.⁶⁹
- 14.61 In light of these existing codes of ethics, the expert bodies indicated that an oath was probably unnecessary. However, they did not object to interpreters providing an oath or affirmation if that ensured confidence in the justice system.⁷⁰
- 14.62 Similarly, Professor Jemina Napier, Professor Sandra Hale and Associate Professor Mehera San Roque told the Commission that:

On the one hand, a properly trained interpreter would already be professionally required (incorporated into NAATI certification and national standards) to maintain confidentiality and remain impartial. However, there is some benefit for the interpreter and the Court in providing an oath to interpret for jurors because it sets a scene which builds confidence in the interpreter's abilities and role. It would also allay the fears of the public/legal profession about the interpreter.⁷¹

⁶³ *Lyons v State of Queensland* [2016] HCA 38, (2016) 259 CLR 518, [35].

⁶⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) Proposal 7–15 (b), 18, 192; New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) Recommendation 1(d).

⁶⁵ *Evidence Act 2008* (Vic) s 22, sch 1.

⁶⁶ Submissions 8 (Victoria Legal Aid), 11 (Supreme Court of Victoria), 14 (County Court of Victoria).

⁶⁷ Submission 13 (Juries Victoria); Consultations 2 (Law Institute of Victoria), 4 (Victorian Criminal Bar Association), 16 (Office of Public Prosecutions Victoria).

⁶⁸ Australian Sign Language Interpreters' Association (ASLIA), *Code of Ethics and Guidelines for Professional Conduct* (2007); Australian Institute of Interpreters and Translators (AUSIT), *Code of Ethics* (November 2012); Consultations 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

⁶⁹ Consultation 13 (National Accreditation Authority for Translators and Interpreters (NAATI)).

⁷⁰ Consultations 5 (Expression Australia), 13 (National Accreditation Authority for Translators and Interpreters (NAATI)), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)), 19 (Australian Institute of Interpreters and Translators (AUSIT)).

⁷¹ Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

- 14.63 A Deaf Victoria consultation participant told us that:
- An Auslan interpreter isn't really a person in the jury room, instead they should be viewed as an access tool. To ensure confidence in the participation of the interpreter an oath should be provided by an interpreter before jury deliberations. Taking an oath is important to ensure that the jury's decision won't be challenged on the basis of confidentiality or impartiality.⁷²
- 14.64 The County Court told us:
- jurors may begin discussing the matter from a very early stage. Therefore, the oath or affirmation ought to be administered at the outset by the judge. That is, when the jury are ready to be empanelled (whether that be when the jury is brought into the courtroom or by audio visual link). A further oath may be required before the jurors retire to consider their verdict. Oaths and affirmations would be required for any new support persons who are brought into the trial to assist.⁷³
- 14.65 Peter Ward noted that his concerns about limiting the 13th person rule could be allayed if an Auslan interpreter were required to swear an oath/affirmation to maintain confidentiality and not get involved in deliberations.⁷⁴

Oaths in other jurisdictions

- 14.66 An oath or affirmation is already required of interpreters and support people who assist jurors in the United States and New Zealand.⁷⁵ In Monroe County, New York State, the oath provided by an interpreter working with a deliberating juror is:
- Do you swear that you shall interpret well and truly between members of the jury, to the best of your ability during these deliberations, you shall not offer your own opinions or comments, nor speak to them in any manner, unless to convey the contents of the jurors' deliberations, So help you God.⁷⁶
- 14.67 In England and Wales, BSL interpreters who work with jurors will be contractually bound to a confidentiality agreement which will stipulate their obligation to always remain impartial and they will be required to swear an oath to that effect.⁷⁷
- 14.68 The wording of the legislation in either the ACT or the United States, or a combination of both, would be appropriate for Victoria. In the ACT, the oaths/affirmations require that an undertaking be given to the court to:
- well and truly interpret the proceedings and the jury's deliberations and that I will not otherwise participate in the jury's deliberations or disclose anything about those deliberations, except as allowed or required by law.⁷⁸
- 14.69 The oath in the ACT encompasses 'proceedings' and 'deliberations'. The Commission recommends that one oath is made early on in the jury selection process and is the subject of reminders at various later stages in the process. If any additional interpreters are involved in proceedings later on, they can be sworn in when they start.

⁷² Consultation 6 (Deaf Victoria and community participants).

⁷³ Submission 14 (County Court of Victoria).

⁷⁴ Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

⁷⁵ Consultations 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States), 15 (Representatives of High Court and District Courts of New Zealand).

⁷⁶ Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States). In Chapter 10 we noted that an American Sign Language interpreter provides an oath or affirmation when they start interpreting in the courtroom. The staff interpreter does not have to be sworn every time they interpret.

⁷⁷ Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021.

⁷⁸ *Juries Act 1967* (ACT) sch 1 pt 1.1A.

Recommendations

21. The Judicial College of Victoria should develop and deliver training to the judiciary on the Recommended National Standards for Working with Interpreters in Courts and Tribunals and about the training and certification requirements for Auslan interpreters.
22. Auslan interpreters should work in pairs and must be independent of the juror.
23. Auslan interpreters who interpret for jurors should be qualified at a Certified Specialist Legal Interpreter level, or if not available, at a Certified Interpreter level.
24. All Auslan interpreters who interpret for jurors should complete a professional development unit about the role.
25. The courts should develop standards and a code of conduct for Auslan interpreters, which outlines their role and responsibilities. Amendments to the Juries Act should be accompanied by regulation that includes accreditation requirements, standards, and a code of conduct for Auslan interpreters.
26. An oath or affirmation for Auslan interpreters should be included in the Juries Act regarding their duty to maintain confidentiality, not participate in or disclose deliberations and interpret truthfully.

Addressing the shortage of Auslan interpreters in the courts

- 14.70 Several factors make it difficult to plan for the provision of Auslan interpreters for jury service:
- There is a shortage of Auslan interpreters qualified to work in a court context.
 - It is very difficult to predict the duration of the Auslan booking because cases may settle, or other unforeseen delays may occur.
 - It is impossible to know if interpreters will ultimately be needed for a trial.
- 14.71 Issues are compounded in regional areas because interpreters mainly travel from metropolitan Melbourne.

Not many Auslan interpreters do court work

- 14.72 Not many Auslan interpreters work in the courts.⁷⁹ Those who do, often have five to ten years of experience.⁸⁰ AUSIT told us that:
- Less people work in the higher courts. There are probably less than 20 Auslan interpreters available to work on more complex legal matters.
- Sometimes Auslan interpreters are flown in from interstate for complex legal matters. This might occur if one Auslan interpreter has done lots of work in the lower courts on a matter and new interpreters are preferred for the higher court work.⁸¹
- 14.73 We note that the Victorian Government has recently announced fee-free TAFE courses for Auslan interpreting.⁸² While it will take some time for Auslan interpreters to gain the required level of experience for court work, this is a positive step to address the shortage of Auslan interpreters.

⁷⁹ Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

⁸⁰ Consultations 5 (Expression Australia), 18 (Australian Sign Language Interpreters' Association, Victoria and Tasmania (ASLIA)).

⁸¹ Consultation 19 (Australian Institute of Interpreters and Translators (AUSIT)).

⁸² The Victorian Government announced in May 2022 an investment of more than \$4 million through the Victorian Budget 2022/23 to make the Diploma of Auslan and the Advanced Diploma of Interpreting (Auslan stream) available fee-free at TAFE from 2023. This is likely to increase the number of Auslan interpreters in the future: The Hon. Gayle Tierney, Minister for Training and Skills and Higher Education (Vic), 'Increasing the Auslan Teaching Workforce In Victoria' (Media Release, 17 May 2022).

- 14.74 We understand that one of the factors contributing to the current shortage is that Auslan interpreters are paid the same amount for complex legal court work as they are for simpler work. Therefore, there is a lack of incentive for interpreters to specialise in court work. We have heard that often people who do this work do so because they are motivated by social justice principles.⁸³
- 14.75 To address the shortage of Auslan interpreters, the Commission recommends that the courts and Juries Victoria remunerate Auslan interpreters who do jury work at a rate that recognises the extra skills and training required for this specialised work.

Unpredictability of court timing and the need for consistency of interpreters

- 14.76 It is difficult to know how long an Auslan interpreter will be needed for. Juries Victoria and Brent Phillips noted that this creates challenges for Auslan service providers and for interpreters in planning their work schedules.⁸⁴
- 14.77 Brent Phillips commented that:
- Another logistical issue is that it is difficult to anticipate how long an interpreter might be needed for jury work. It might be useful for the court to have a pool of interpreters on hand to call upon.
- It would be worth obtaining data from Court Services Victoria about how many Auslan interpreters are booked for court work and how often to see if there is scope for the courts to have interpreters employed full time? If you added up all the Auslan requirements, would it amount to a full-time position (or a few positions)?⁸⁵
- 14.78 Another complicating factor is the need for consistency in Auslan interpreters. It has been suggested that it is better if the same interpreters are employed for the duration of a trial. Della Goswell advised that:
- Consistency is important in a trial and in deliberation. There is a co-creation of knowledge and style that is developed and that is important to maintain for comprehension. We were told that when you swap someone over, there is a loss of style and background information which jeopardises clarity.⁸⁶
- 14.79 Brent Phillips told us:
- It might be useful to have consistency in Auslan interpreters in a trial because interpreters will come to know the names of the parties involved in the case, issues, terminology etc. This might be difficult if there are shortages of interpreters available and you have to be careful about burn out. Because the deaf community is small and there are not many interpreters working in the courts, there may be an issue where the parties or prospective juror knows the Auslan interpreter (eg they are cousins or friends etc.) and does not want them to translate.⁸⁷

The need to book early

- 14.80 Expression Australia made some observations about how Auslan interpreters are booked for court work. It noted that there seems to be a lack of awareness about shortages in supply and bookings are often made at the last minute, when it is too late. This impacts access for deaf people.⁸⁸
- 14.81 While nothing can be done to provide more certainty about whether a person will be selected for jury duty or how long the trial will last, it is important that Juries Victoria books Auslan interpreters for jury work under the proposed new laws as early as possible.

83 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).
 84 Consultations 8 (Brent Phillips), 10 (Juries Victoria).
 85 Consultation 8 (Brent Phillips).
 86 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).
 87 Consultation 8 (Brent Phillips).
 88 Consultation 5 (Expression Australia).

Keeping records of Auslan bookings

- 14.82 Records should be kept about the number of bookings made each year and for how long. This will assist the court to determine if it would be more efficient to consider employing an in-house Auslan interpreter/s for this work.
- 14.83 We note that in Monroe County, New York State, sign language interpreters are used almost weekly for jury duty and are usually hired through external service providers, as needed. The Jury Commissioner has one part-time in-house sign language interpreter.⁸⁹

Surveying staff

- 14.84 It may assist if the Department of Justice and Community Safety, the courts and Juries Victoria survey staff to ascertain if any of them have Auslan qualifications at the court interpreting level. If so, they could be seconded to assist with training or pre-employment court visits or the occasional trial.

Recommendations

27. When booking Auslan interpreters, Juries Victoria should ensure that wherever possible the same interpreters are available for the duration of the trial to maintain consistency in interpreting.
28. Juries Victoria should retain data about the number of bookings it makes for Auslan interpreters, including the number of interpreters and how long they are needed.
29. The Courts and Juries Victoria should pay Auslan interpreters who undertake jury work a rate that is commensurate of the skill required to perform the role and at a level that will retain and attract Auslan interpreters to do this type of work.

CHAPTER 15

Accessibility officers and support persons

170 Overview

170 A new accessibility officer role

172 Support persons

175 The Act should allow for the appointment of a support person

177 New offences should exist for Auslan interpreters or support persons who
breach their duties to the court

15. Accessibility officers and support persons

The court needs to be able to provide a support person to assist people throughout the process – to show them where the rest rooms are, to help them in mealtimes etc.¹—Participant in the Blind Citizens Australia consultation

Overview

- We propose a new role for an accessibility officer to provide logistical support for jurors from the subject groups, including navigation of the court building, but not to assist in jury deliberations.
- We recommend that the *Juries Act 2000* (Vic) provide for a support person as an adjustment for people in the subject groups. The role can be further developed over time as the need arises. It is most likely to be helpful for people who are blind or have low vision to assist them to access visual evidence.
- Training and qualification requirements may need to apply to the support person role, and the support person should be subject to standards and a code of conduct. A support person should provide an oath or affirmation to the court and be subject to penalties for breach of duties. We also discuss penalties for breach of duties for Auslan interpreters in this chapter.

A new accessibility officer role

- 15.1 People in the subject groups told us that it would be helpful if a potential juror could be assigned a person to assist them to navigate the court building during the jury selection process and the trial. We have referred to this person as an accessibility officer (although some of the consultees use the terminology 'support person', which we have used for a separate type of adjustment). It is envisaged that the accessibility officer would be arranged by the court or Juries Victoria.
- 15.2 Vision Australia suggested that a 'court appointed support person should be assigned at the outset [of the jury selection process]':²
- We envisage that a court-appointed support person would assist a (prospective) blind or low vision juror from the time they arrive at the court precinct (for example, by taxi or public transport) until they leave after the trial or after they have been stood aside. The support person would assist the blind or low vision juror with a variety of tasks and activities, including: navigating around the court environment (for example, getting from one part of the building to another, finding the bathroom, locating meals and refreshments); identifying key people such as the trial judge and the foreman of

¹ Consultation 1 (Blind Citizens Australia).
² Consultation 7 (Vision Australia).

the jury; accessing documents and other material during the trial; describing (but not interpreting) information presented visually, such as charts and graphs.³

- 15.3 Blind Citizens Australia also supported the provision of a 'support person' and noted:
- The Commission can't assume that everyone who is blind or with low vision will turn up at Court with a supporter. Some people might turn up on their own. Therefore, the court needs to be able to provide a support person to assist people throughout the process—to show them where the rest rooms are, to help them in mealtimes etc.⁴
- 15.4 Her Majesty's Courts and Tribunal Services (HMCTS) have advised that an usher is assigned in England and Wales to support a juror with disability throughout their service to 'make the juror feel more at ease'.⁵
- 15.5 We agree that an accessibility officer role should be created to complement reforms in Victoria. The officer should be available to jurors from the subject groups where needed.

What would an accessibility officer do?

- 15.6 An accessibility officer would provide assistance with navigation through the jury selection process and during trial. The role should be limited to practical support in and around the courtroom. The accessibility officer would not enter the jury deliberation room. If a person needed similar assistance in the jury room, they could be paired with a 'buddy juror' at the start of deliberations. This is what happens in England and Wales.⁶
- 15.7 The work required would depend on the potential juror's individual needs. Generally, however, the accessibility officer might:
- greet the potential juror at the court building
 - assist the potential juror through court security
 - direct them to the jury pool room
 - direct them from the jury pool room to the courtroom if needed
 - help them find the rest rooms
 - direct them to meal locations
 - organise basic technical support such as headphones or other hardware
 - help take a support animal for relief breaks if required
 - help them with navigation at a 'view' of a crime scene.

Who should be an accessibility officer?

- 15.8 This role should be performed by a person who is independent of the person from the subject groups. It should not be a person's carer or family member, although they would be welcome to accompany the person to the courtroom door.
- 15.9 The need for independence was supported by people from the subject groups. Blind Citizens Australia noted in consultations that:
- for the formal role of communicating between the Court and the juror it would be better if the supporter was independent and hired by the Court, not a family member. The person should have specialised legal knowledge/knowledge of the court process. An NDIS worker would not always have the required skills for this role and they do not know about technology and the law.⁷

3 Submission 10 (Vision Australia).

4 Consultation 1 (Blind Citizens Australia).

5 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 15 September 2021.

6 Ibid.

7 Consultation 1 (Blind Citizens Australia).

- 15.10 Daniel Stubbs commented:
- It will be important that the support person is professional and independent—the blind juror can't just bring their mum.⁸
- 15.11 County Court consultees agreed that a 'support person for a person with a disability should also be independent', similarly to the way in which intermediaries⁹ 'are not allowed to have a "treating relationship" with the person they are assisting'.¹⁰
- 15.12 Both the County Court and Supreme Court consultees were of the view that the tipstaff should not perform this role. The County Court consultees commented that 'a tipstaff is not specifically trained to be an aid for a person with a disability',¹¹ while the Supreme Court consultees noted that 'Tipstaff has too many other things to manage'.¹²
- 15.13 As an alternative to funding a new position for these duties, the role might be performed by Court Network volunteers with appropriate training. This option should be explored further by the courts and Juries Victoria.¹³
- 15.14 Training should be required for accessibility officers. It should include:
- information about their role and responsibilities
 - information about the responsibilities of a juror and what happens over the course of an ordinary day
 - disability awareness training, including training about how various adjustments work in practice (see Chapter 18)
 - their responsibility to the court, including protocols that would normally apply to jurykeepers, such as not discussing the trial with the juror or other jurors or attempting to influence the jurors. If necessary, the accessibility officer should politely inform a juror that all matters about the case must be raised either with fellow jurors (if the matter relates to the jury's decision-making) or to the trial judge, via the foreperson (if the matter relates to further directions or an irregularity).¹⁴

Recommendation

30. The courts and Juries Victoria should ensure that an accessibility officer is available to assist a person from the subject groups, where needed, with practical and logistical issues throughout the jury selection process and the trial. This person would not be permitted to enter the jury deliberation room.

Support persons

- 15.15 A potential juror who is blind or has low vision may also require some support to access documentary visual material (such as graphs or photographs).¹⁵ They may also need assistance on a 'view' of a crime scene in a criminal trial.

⁸ Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

⁹ Intermediaries are skilled communication specialists who assist vulnerable witnesses to give their best evidence. Their role is to help communication with the witness and to assist the witness to give evidence to police and in court. Intermediaries are neutral and are officers of the court: see Department of Justice and Community Safety (Vic), 'Victorian Intermediaries Pilot Program', *Victoria State Government* (Web Page, June 2020) <<http://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>>.

¹⁰ Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

¹¹ *Ibid.*

¹² Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

¹³ Court Network is a front-line community organisation of more than five hundred volunteers, which 'enables court users to better understand and navigate the court system': see Court Network, *Court Network Annual Report 2019/20: Celebrating 40 Years* (Report, 2020) 7.

¹⁴ These are the protocols usually applied to jury keepers. We do not envision that the accessibility officer will take the place of the jury keeper but will be an additional support specifically provided to the juror from the subject groups: see Judicial College of Victoria, '11.7 Jury Sequestration and Separation', *Victorian Criminal Proceedings Manual* (Online Manual, 25 February 2014) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

¹⁵ Online Survey (Response 19): 'I would need a support person present and also be able to bring my guide dog with me. I would need audio description of any visual evidence such as photographic charts tabular data etc'.

- 15.16 The list of possible supports that can be provided under section 16(2) of the *Juries Act 1967* (ACT) includes a 'support person'. At the time of writing, no one has served on a jury in the ACT under these new laws. It is not clear to the Commission who would fulfil the role of support person and what duties they would undertake.
- 15.17 In consultation with the ACT Sheriff's Office, it was suggested that perhaps the role could be fulfilled by a family member, a support worker or a person approved or supported by Vision Australia. The ACT Sheriff has advised that a judge would have to make the final determination about who could assist and in what capacity. This would need to be assessed on an individual basis.¹⁶

Community ideas about the support person role

- 15.18 We received some limited suggestions of what role a support person might perform. For example, Vision Australia commented that:
- There may be (probably rare) situations where a juror who is blind or has low vision will require support from someone who has had professional training in the techniques of audio description, in order to gain access to visual details that are ancillary to, but not an inherent part of, the trial (for example, dress styles, physical attributes). It is important to bear in mind that professional audio-describers are trained in how to provide access to visual information by eliminating subjective interpretation in favour of objective elements about which there would be quasi-universal agreement. We therefore feel that the need for a professional audio-describer as part of the support team would not, in itself, affect the accuracy of the trial record. A support person could be in the deliberations room on a very limited basis, namely, to describe documents etc. In other words, they hold a translation-type role, analogous to an Auslan interpreter.¹⁷
- 15.19 Vision Australia recognised that 'these alternatives may not be satisfactory in all cases, especially if the documents were complex and if the juror would be required to refer to them frequently'.¹⁸
- 15.20 Blind Citizens Australia commented that:
- facial expressions should be audio described. There might be times where a sighted person could see the facial expressions of the person giving evidence and make judgements about those details. These should also be described by the audio describer to the blind/visually impaired juror.¹⁹

Readers and audio describers

- 15.21 In the United States, a 'qualified reader' is a support person specified in the *Americans with Disabilities Act*.²⁰ It is defined as 'someone who is able to read effectively, accurately, and impartially, using any necessary specialized vocabulary'.²¹ The qualifications for a 'qualified reader' are outlined in case law.
- 15.22 An audio describer is another role that may assist a person who is blind or has low vision. An audio describer is a professional who can communicate the contents of visual evidence to a person who is blind or has low vision. Audio description has been defined in the United States context as:
- a service that provides a succinct and precise account of visual information to people who are blind or have low vision.²²
- 15.23 In the arts, audio description:
- informs the listener about facial expressions, body language, physical comedy, dance

16 Information provided by ACT Sheriff to Victorian Law Reform Commission, 4 August 2021; Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

17 Submission 10 (Vision Australia).

18 Ibid.

19 Consultation 1 (Blind Citizens Australia).

20 Disability Rights Section, Civil Rights Division, United States Department of Justice, 'Effective Communication', *ADA Requirements* (Web Page) <<https://www.ada.gov/effective-comm.htm>>.

21 Ibid.

22 'What Is Audio Description?', *Audio Description Training Retreats* (Web Page) <<http://www.adtrainingretreats.com/aboutad.php>>.

movements, costumes, changes of scene, and other visual information crucial to fully understanding and experiencing the performance. AD provides the blind or [listener with low vision] a more complete and satisfying access to cultural experiences.²³

Increasing professionalisation of audio description in the United States and United Kingdom

- 15.24 Audio description is becoming professionalised in the United Kingdom and the United States. We were told that this is because new laws require audio description in television programming.²⁴ However, we understand that audio describers do not play a role in court proceedings in these countries.
- 15.25 In the United Kingdom, there are some online training programs for audio describers. For example, Royal Holloway, University of London offers a free online Audio Describer course that is four weeks long and requires three hours of study per week.²⁵
- 15.26 In the United States:
- The American Council of the Blind offers training and educational resources.²⁶
 - The Audio Description Institute offers 'audio description training retreats' which run for four days (in person and online) and offers over 20 hours of formal instruction.²⁷
- 15.27 The United Kingdom has developed guidelines on the practice of audio description, as has the United States. The Commission recommends that similar guidelines be developed in Victoria as audio description becomes more professionalised.

Audio description in Australia

- 15.28 Advocacy groups for the blind have told us that audio description is becoming more common in Australia and that reforming the jury system to allow such support could be an opportunity to promote wider uptake and change.²⁸
- 15.29 Being an audio describer is a skilled disability support role. While they do receive training, audio describers in Australia are not yet as professionalised as Auslan interpreters. At present, audio describers mostly work in the arts in Australia.²⁹ They have not been used in a court context.
- 15.30 Further, unlike Auslan interpreters, audio describers are not subject to a code of ethics, nor do they need to meet rigorous certification requirements. Some training is required, but this is not regulated.³⁰
- 15.31 If a blind person needs assistance accessing 'documents, graphs, charts or other written material', the preferred first step would be for the judge to ask counsel to read out any visual exhibits in court.³¹ It may also be that some simple material could be described by counsel in open court or a fellow juror in deliberations.
- 15.32 When audio description becomes more professionalised and regulated in Australia, audio describers may take on the support person role with appropriate training. Vision Australia referred to the importance of training for an audio describer:

It is important that the support person is trained in the art of audio description. Their role is to describe the facts on the page, not to provide interpretation. There are skills involved in that process, and they are skills that can be taught and can be learned. This is important to alleviate concerns about the supporter being a 13th juror.³²

23 'What Is Audio Description?', *Audio Description Training Retreats* (Web Page) <<http://www.adtrainingretreats.com/aboutad.php>>.
24 Consultation 29 (Service Coordinator, Description Victoria).
25 Royal Holloway, University of London, 'Creating Audio Description: Equality, Diversity, and Inclusion', *FutureLearn* (Web Page) <<https://www.futurelearn.com/courses/creating-audio-description-for-equality-diversity-and-inclusion/1>>.
26 'The Audio Description Project: Audio Description Training and Education Resources', *American Council for the Blind* (Web Page) <<https://adp.acb.org/education.html>>.
27 'Upcoming Retreats', *Audio Description Training Retreats* (Web Page) <<http://www.adtrainingretreats.com/upcoming.php>>.
28 Consultation 1 (Blind Citizens Australia). Also Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).
29 Consultations 28 (National Coordinator of Audio Description, Vision Australia), 29 (Service Coordinator, Description Victoria).
30 Ibid; Description Victoria, *Annual Report 2020* (Report, 2020).
31 Submission 10 (Vision Australia).
32 Consultation 7 (Vision Australia).

The Act should allow for the appointment of a support person

- 15.33 In Chapter 11 we recommended that the Juries Act provide the option for a judge to appoint a support person to enable someone in the subject groups to serve as a juror.
- 15.34 We note that the new laws in England and Wales to limit the operation of the 13th person rule only apply to British Sign Language (BSL) interpreters. They do not allow support persons more generally to enter the jury room.³³ Whether to extend the new legislation to other support persons was debated in Parliament but was ultimately decided against.³⁴
- 15.35 In contrast, Victorian legislation should be kept broad to enable the possibility of a support person being appointed. It will be a matter for a judge to decide whether a support person is needed, what their role should be and who should perform the role. This will be influenced by the needs of the potential juror and nature of the trial. The judge will talk to the potential support person about their experience and skills to undertake a support role and reach a decision about whether that support person could facilitate jury service for the person from the subject groups.
- 15.36 Judicial practice regarding the exercise of this judicial discretion should be carefully monitored by Juries Victoria to inform future reform.

Training for the specific role of working with jurors

- 15.37 While the approach in the ACT contemplates a possible role for a family member or carer, the Commission's view is that a support person should be an independent court appointment. This was supported by Vision Australia, which commented that the support person/audio describer role:
- is a specialised role and should be filled by an independent support person (rather than someone bringing their own support person). The supporter would be trained to describe documents, orient the person etc.
- 15.38 Organisations such as Description Victoria and Vision Australia could work with Juries Victoria and the courts to develop appropriate training requirements.
- 15.39 When audio description becomes more professionalised in the future, we recommend that the training/accreditation for that role should be incorporated in regulation in the same way recommended in Chapter 14 for Auslan interpreters.

Standards and a code of conduct for support persons

- 15.40 Anyone who undertakes the role of a supporter should, like Auslan interpreters, be subject to standards and a code of conduct to ensure that they understand the limitations of their role and can undertake it to a professional level. In the ACT, the support person will be required to sign and return the code of conduct and standards prior to attending court to work alongside the potential juror.³⁵
- 15.41 The ACT standards document for support persons is a good model for Victoria. Like the standards developed for court interpreters, it includes information about punctuality, dress, equipment, breaks and options to obtain feedback about the role. The document suggests that the supporter will receive 'remuneration for their services including preparation time, travel time and accommodation costs (where appropriate)'. The duties required of a supporter are:
- Diligently and impartially provide support to the juror
 - Diligently convey communication between jurors as accurately and completely as possible and not add or include your opinion or beliefs
 - Comply with all directions of the Court

³³ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196. This Act only applies to England and Wales.
³⁴ United Kingdom, *Parliamentary Debates*, House of Commons, 17 June 2021, vol 697 col 622 (Steve McCabe, Chair).
³⁵ Information provided by ACT Sheriff to Victorian Law Reform Commission, 30 May 2022.

- Alert the Judge if you become aware of a conflict of interest
 - You must keep confidential all information acquired, in any form whatsoever, in the course of your engagement or appointment unless that information is or comes into the public domain. This is particularly in relation to jury deliberations. Under no circumstances can jury deliberations or the identity of jurors be revealed.
 - You are not to take part in discussions between jurors (except in relation to support services)
 - You are not to convey your own belief, opinion or have a say in the decision of the jury.³⁶
- 15.42 Support persons should also be required to commit to a code of conduct. Unlike Auslan interpreters, they are not subject to a professional code of ethics. The ACT Sheriff has developed a code of conduct for support persons which is a good model for Victoria. It covers the following topics:
- general duty to the court.
 - duty to comply with directions of the court
 - duty of impartiality including duty to avoid a conflict of interest with other parties in the trial
 - duty of competence
 - duty of confidentiality
- 15.43 The code of conduct notes that:
- A support person has an overriding duty as an officer of the Court to assist the Court impartially.
 - A support person's paramount duty is to the Court and not to any party to or witness in the proceedings (including the person retaining or paying the Support Person).
 - A support person is not an advocate, agent or assistant for the juror.³⁷

Support persons should provide an oath to the court

- 15.44 To protect the secrecy of jury deliberations, and ensure that support persons do not unduly influence the deliberations, the Commission recommends that support persons should provide an oath or affirmation to the court.
- 15.45 The ACT model is a good guide for Victoria. A support person in the ACT must take an oath or affirmation to '... well and truly support the juror to discharge the juror's duties, [and not] otherwise participate in the jury's deliberations or disclose anything about those deliberations, except as allowed or required by law'.³⁸

³⁶ Information provided by ACT Sheriff to Victorian Law Reform Commission, 18 September 2020; Information provided by ACT Sheriff to Victorian Law Reform Commission, 16 September 2020.

³⁷ Ibid.

³⁸ *Juries Act 1967* (ACT) sch 1 pt 1.1B.

Recommendations

31. The Juries Act should be amended to provide for the appointment of an independent support person to enable a person who is deaf, hard of hearing, blind or has low vision to perform the role of juror.
32. The nature of the support person's role and who should perform the role should be determined by the judge.
33. The courts should develop standards and a code of conduct for support persons, which outline their role and responsibilities. Amendments to the Juries Act should be accompanied by regulation that includes standards and a code of conduct for support persons, and may include accreditation requirements in the future.
34. An oath or affirmation should be included in the Juries Act regarding the support person's duty to maintain confidentiality, not participate in or disclose deliberations, and to well and truly support the juror.

New offences should exist for Auslan interpreters or support persons who breach their duties to the court

- 15.46 In upholding the 13th person rule, the High Court in *Lyons* referred to the absence of provisions to prevent an Auslan interpreter from publishing information about statements made, opinions expressed, arguments advanced or votes cast, in the course of a jury's deliberations.³⁹
- 15.47 In England and Wales, the new Act, which permits BSL interpreters into the jury room, extends the offences that apply to jurors to BSL interpreters.⁴⁰ The Act also creates a specific offence for 'interpreters interfering in or influencing jury deliberations'.⁴¹ This is an indictable offence, for which an interpreter is liable to imprisonment for a term not exceeding two years, or a fine (or both).
- 15.48 The ACT's reformed Juries Act does not explicitly extend penalties to interpreters or support persons.⁴²
- 15.49 Introducing new penalties in Victoria for breach of duties was supported in community responses. The Law Institute of Victoria suggested that a new criminal offence for violating the oath or affirmation could be created (similar to perjury), to ensure compliance.⁴³ This was reiterated in its submission:

The LIV supports the common law prohibition on supporters/interpreters assisting in the jury room to be modified by legislation. The supporter/interpreter should be required to take an affirmation that they will accurately and objectively interpret/support proceedings, maintain the confidentiality and secrecy of deliberations and not disclose any information learnt in the jury room. The LIV considers that new offences should be introduced to deter supporters/interpreters from violating their affirmation, which should be of a similar nature to the court conduct based criminal offences of contempt of court or perjury.⁴⁴

39 *Lyons v State of Queensland* [2016] HCA 38; (2016) 259 CLR 518, [36]–[37].

40 *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196.

41 Ibid; When this section comes into force on 28 June 2022, it will insert a new criminal offence into the *Juries Act 1974* (UK): 's 201 Offence: interpreters interfering in or influencing jury deliberations'.

42 *Juries Act 1967* (ACT).

43 Consultation 2 (Law Institute of Victoria).

44 Submission 7 (Law Institute of Victoria).

- 15.50 Similar points were made in submissions by Victoria Legal Aid, Juries Victoria, and Vision Australia.⁴⁵ Vision Australia noted:
- If existing offences do not cover a breach of confidentiality of jury deliberation by a person providing reasonable supports, then we are in favour of new offences being created. Having appropriate deterrents will help build confidence that people who are blind or have low vision can be supported to serve on juries without sacrificing the sanctity of the jury room.⁴⁶
- 15.51 Part 10 of the *Juries Act 2000* (Vic) (the Act) contains a list of offences for breach of the obligations and duties that arise in the Act. The Commission recommends extending to Auslan interpreters and supporters the prohibition on jurors against making enquiries about trial matters.⁴⁷ Other existing offences relating to non-publication of the names of jurors and the confidentiality of jury deliberations should also apply to Auslan interpreters and support people.⁴⁸
- 15.52 Section 65 of the Act prohibits a person from directly or indirectly communicating any information that would lead to the identification of a person from a jury roll, list or panel except in accordance with their duties under the Act. We note that the section 65 secrecy provision applies to 'any other person performing a function or exercising a power' under the Act and would extend to an Auslan interpreter or supporter appointed under the Act.
- 15.53 Victoria should also adopt the approach in England and Wales and introduce a new penalty to prohibit interpreters and support people from interfering in or influencing jury deliberations.⁴⁹
- 15.54 The Commission observes that the new offences may overlap with the common law offence of embracery (attempting to influence the jury).⁵⁰ A new statutory offence is justified as it relates to the newly created statutory positions of interpreter or support person for a juror in the subject groups.

Recommendations

35. The offences in sections 77, 78 and 78A of the *Juries Act* should be extended to Auslan interpreters and support persons appointed under the Act.
36. A new offence should be introduced to prohibit Auslan interpreters and support persons from interfering with or influencing jury deliberations. This could be modelled on the approach in England and Wales.

⁴⁵ See Submissions 8 (Victoria Legal Aid), 10 (Vision Australia), 13 (Juries Victoria).
⁴⁶ Submission 10 (Vision Australia).

⁴⁷ *Juries Act 2000* (Vic) s 78A.

⁴⁸ Ibid ss 77 and 78, respectively.

⁴⁹ *Police, Crime, Sentencing and Courts Act 2022* (UK) s 196.

⁵⁰ *Crimes Act 1958* (Vic) s 320.

CHAPTER 16

Excuse from jury service

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16. Excuse from jury service

*Only the range of excuses that apply to the general community should apply if the law is changed to better assist people who are blind or with low vision to serve. If we want to be regarded as equal citizens, then we should uphold our civic responsibilities.*¹—Participant in the Blind Citizens Australia consultation

Overview

- People in the subject groups should be able to be excused from jury duty for reasons connected to their disability. The *Juries Act 2000* (Vic) (the Act) provides enough scope for this to occur. The Commission does not recommend including disability, in and of itself, as a ground for an excuse.
- In keeping with current practices, the excuse process should not be overly burdensome. To allay concerns about serving as a juror, Juries Victoria should provide information explaining the excuse process.
- Data should be retained about how often, at what stage and the reasons why a person from the subject groups applies to be excused. This should include information about adjustments that are unsatisfactory to a person in the subject groups.
- We recommend that section 32(3) of the Act is amended to make it clear that the court can excuse a panel member on its own motion pursuant to that section.

When should a person be able to be excused?

- 16.1 Sometimes a person from the subject groups may not feel comfortable serving on a jury, even with reasonable adjustments. This chapter considers how and when people from the subject groups should be able to be excused from serving on a jury.
- 16.2 Based on the recommendations in this report, people in the subject groups will be excluded from jury duty only if:
- a judge decides that reasonable adjustments cannot be provided, or
 - where the person is excused, or
 - otherwise ordered by the court.

- 16.3 With regard to being excused, two approaches could be taken:
- 1) provide a specific exemption in the Act 'as of right', which would mean that a person could be excused simply *because they have a disability*, or
 - 2) allow people from the subject groups to be excused in the same way and on the same grounds as every other juror, *on a case-by-case basis for 'good reason'*.²

When can a person currently seek to be excused?

- 16.4 The Act provides various reasons for excuse from jury service. Some of these require the potential juror themselves to seek to be excused; others are instigated by application by the Juries Commissioner or ordered by the court.
- 16.5 Section 8(1) allows a person to ask the Juries Commissioner to be excused at any time before becoming a member of a panel. The Juries Commissioner may excuse a person if 'satisfied that there is good reason for doing so'.³ Examples of 'good reason' provided in the Act, include:
- illness or poor health
 - incapacity
 - substantial hardship to the person
 - advanced age
 - any other matter of special urgency or importance.⁴
- 16.6 A person (or someone on their behalf) may also apply to the Juries Commissioner to be *permanently* excused from jury service. The Juries Commissioner may do so if satisfied that there is 'good reason' which includes:
- continuing poor health
 - disability
 - advanced age.⁵
- 16.7 The Juries Commissioner may also defer service if a person wishes to do so before they join a panel.⁶
- 16.8 The court may excuse a person from jury duty on application from the Juries Commissioner if the court is satisfied that there is a 'good reason' for doing so or order that a person not perform jury service if it is 'just and reasonable to do so'.⁷ The judge may also excuse people late in the selection process after informing the panel about the trial (discussed below).⁸ In this situation, the excused person must return to the jury pool, unless the court otherwise orders, and may be selected for a different jury panel.⁹

Excuses from jury service in other jurisdictions

- 16.9 Other jurisdictions address in varied ways the question of when and how people with disabilities should be able to ask to be excused.

² Currently provided for in the *Juries Act 2000* (Vic) s 8.

³ *Ibid* s 8(2).

⁴ *Ibid* s 8(3).

⁵ *Ibid* s 9 (3), (4).

⁶ *Ibid* s 7.

⁷ *Ibid* ss 11 and 12, respectively. The order not to perform jury service under section 12 can be for whole or part of jury service, for a longer period, or permanently. The Juries Commissioner can also make an application under section 12 if they consider that 'a person may not be able to perform the duties of a juror'.

⁸ *Ibid* s 32(3), (4).

⁹ *Ibid*.

Australian Capital Territory

- 16.10 In the Australian Capital Territory (ACT) the *Juries Act 1967* (ACT) creates a positive obligation on the court to consider the provision and assessment of reasonable supports. There is no specific exemption or excuse 'as of right' for people with disabilities. However, a person 'may claim an exemption from serving as a juror'.¹⁰ The *Juries Regulation 2018* prescribes categories of people who may qualify for exemption, such as 'a person with disability', including 'a person who is totally or partially blind, or totally or partially deaf'.¹¹
- 16.11 A general excuse provision in the ACT Juries Act states that 'if a judge or the sheriff is satisfied that a person summoned or appointed to attend to serve as a juror has shown sufficient reason to be excused',¹² then 'the judge or the sheriff may, at any time after service of the summons or the appointment, excuse the person from attendance or further attendance'.¹³ Examples of 'sufficient reasons' include pregnancy, illness and where 'the person has care of children or of aged or ill people'.¹⁴

England and Wales

- 16.12 In England and Wales, reasonable accommodations are provided where possible, subject to the requirements of the 13th person rule.¹⁵
- 16.13 The *Juries Act 1974* (UK), which applies to England and Wales, states that a summons for a person with a disability should only be discharged if the person is incapable of acting effectively as a juror.¹⁶ There is no excuse 'as of right' for people with disabilities. Rather, this legislation provides a general discretion to exclude a person for good reasons if a person can demonstrate:
- to the satisfaction of the appropriate officer that there is good reason why [they] should be excused from attending in pursuance of the summons, the appropriate officer may excuse [them] from so attending.¹⁷

Monroe County, New York State, United States

- 16.14 The basis for the excuse is on medical grounds in Monroe County, New York State. There is no legislative provision specifically pertaining to disability because the *Americans with Disabilities Act* requires that the court provides access for people with disabilities.
- 16.15 The Jury Commissioner's approach is that if a person receives a disability pension, no further proof of disability is required; in those circumstances, a permanent medical excuse from service is available. For example, if a person notifies the Jury Commissioner that hearing support would not assist them to serve, the Jury Commissioner may excuse the person indefinitely.¹⁸
- 16.16 The Jury Commissioner told us that 'most people who are medically disabled ask to be excused from service'. The Jury Commissioner 'very rarely needs to split hairs about whether a person should serve or not'.¹⁹

10 *Juries Act 1967* (ACT) s 11.

11 *Juries Regulation 2018* (ACT) sch 1 table 1.4 item 8.

12 *Juries Act 1967* (ACT) s 14(1).

13 *Ibid* s 14(2).

14 *Ibid* s 14(1).

15 We discuss recent changes to the law in the United Kingdom regarding British Sign Language interpreters in Chapter 10.

16 *Juries Act 1974* (UK) s 9B. This power is exercised by the judge. This Act only applies to England and Wales.

17 *Ibid* s 9(2).

18 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

19 *Ibid*.

New Zealand

- 16.17 We were told by consultees from the High Court and District Court of New Zealand that, of the thousands of summonses sent out over the past three years, only 14 people have been excused for reasons of disability from the High Court and only one from the District Court. The consultees further noted:
- There seems to be quite a bit of self-selection when it comes to potential jurors with hearing or vision loss. Some people contact the court after they have received their summons (usually around six weeks prior to the trial) to say, 'I have disability x, what does the court have to support me to serve?'. However, more commonly, a person with hearing or vision loss will call and state that 'I have reflected on it, and learned about the system, and don't feel comfortable to serve'.²⁰
- 16.18 A New Zealand court consultee noted that excuse is currently dealt with on a case-by-case basis. If a person with disability is willing to serve, the court works with them to facilitate it. However, it was also noted that excusal should be an option for those with disabilities.²¹

What did other law reform bodies say about excuse from jury service?

- 16.19 Previous reviews by law reform bodies have emphasised the importance of making a case-by-case assessment of the provision of reasonable adjustments. There was a preference for excuse 'for good cause' rather than 'as of right'.²² For example, the New South Wales Law Reform Commission (NSWLRC) recommended that:
- Sickness, infirmity or disability which renders a person unable to discharge the duties of a juror should no longer be a ground of exclusion, but should be considered as a ground of excusal for good cause.²³
- 16.20 The NSWLRC explained that:
- The preferable course is to treat it, on a case by case basis, as a potential ground for excuse for good cause, reserving to the authority that administers the Act the capacity to grant either a permanent excusal, or an excusal for a particular trial.²⁴
- 16.21 The Queensland Law Reform Commission recommended that considerations around excusal for cause should be made by reference to guidelines, which should:
- include information for prospective jurors with physical disabilities about the facilities that may be available, and the procedures that should be followed, to enable them to serve. There may also be benefit in providing guidance for the Sheriff, and the Court, in assessing whether a person's physical disability can be accommodated ... The Commission does not anticipate, however, that the guidelines would be overly prescriptive; it is necessary to maintain the discretion and flexibility to consider and deal with individual circumstances.²⁵

²⁰ Consultation 15 (Representatives of High Court and District Courts of New Zealand).

²¹ Ibid.

²² See Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Discussion Paper Project No 99, September 2009) 117; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) 258 [9.26] Recommendation 9.1.

²³ New South Wales Law Reform Commission, *Jury Selection* (Final Report No 117, September 2007) Recommendation 24.

²⁴ Ibid 100 [5.16]. We note that in 2006 the New South Wales Law Reform Commission recommended that a person who is blind or deaf should be able to participate with supports but should also 'have an unqualified right to be exempt from jury service': New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 58 [4.7].

²⁵ Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) 284 [9.118].

Community responses: excuse from jury service

- 16.22 In response to this inquiry, advocacy groups and other consultation participants held a range of views. The difference between excuse as of right and for good cause is nuanced and complex, with some responses revealing that perhaps this distinction was not well understood. Overall, however, there was a consensus that people in the subject groups may sometimes need to be excused because of issues relating to disability, despite being otherwise eligible to serve with reasonable adjustments.

Advocacy groups

- 16.23 Most advocacy groups supported the idea that disability should not be an excuse in and of itself. However, they thought that people in the subject groups should still be able to seek to be excused if they felt that they could not perform the role of juror due to the impact of their disability. The same conclusion was reached in the campaign for equal participation for women on juries in the 1960s and 1970s. We discussed this in Chapter 5.
- 16.24 The Victorian Equal Opportunity and Human Rights Commission commented in consultation that:
- Not creating a system of low expectations is important. The starting point is that all people have civic rights and duties to take part in public life, including the jury system.²⁶
- 16.25 Vision Australia was of the view that blindness or low vision should, in general, not be a sufficient reason for being excused from jury service. It explained:
- However, there may be reasons associated with an individual's disability that make it difficult or impossible for them to serve, and it should not be unduly onerous for them to seek to be excused in such cases. For example, a person who is blind may not have access to the technology needed to read electronic documents, or they may lack specific skills in reading the complex documents that will form evidence in a particular trial. A person may also have additional disabilities that will make it more difficult for them to participate effectively in the jury process. It is therefore important that the Act include clear guidance and enumeration of reasons that would be sufficient for an excuse. It is also important that there is the option for an excuse to be limited to a particular case, rather than automatically triggering a permanent exemption.²⁷
- 16.26 In consultation, Youth Disability Advocacy Service (YDAS) explained its view that there should continue to be an option for people to be excused on the basis of disability, but that this should not be framed as the 'primary reason for allowing people to be excused' because this might reinforce assumptions about the abilities of people from the subject groups and provide an excuse for the courts not to provide adjustments. Instead, YDAS suggested that 'Consideration of the person's disability should be included as a background/contributing factor for other reasons why they may need to be excused'.²⁸
- 16.27 The 2007 Blind Citizens Australia Position Statement on Jury Service sets out its view on when excuse should be available:
- Legislation should require that only after support services provided to perform jury service are considered, can difficulty with performing jury duties on the basis of blindness or vision impairment be grounds for being excused from jury service on the basis of the blindness or vision impairment.²⁹

26 Consultation 20 (Victorian Equal Opportunities and Human Rights Commission).
27 Submission 10 (Vision Australia).
28 Consultation 17 (Youth Disability Advocacy Service (YDAS)).
29 Position Statement 1 (Blind Citizens Australia).

Responses by people from the subject groups

- 16.28 The majority of people from the subject groups who were involved in consultations, surveys or who contributed submissions believed that excuse from jury service should only be available as it is for all community members. For example, Alastair McEwin expressed the view that reforms should not allow 'special exceptions' for people in the subject groups but focus on 'core principles of equality' and what adjustments are required for a person from the subject group to serve: 'People should not be allowed to be excused on the basis of deafness alone'.³⁰
- 16.29 Brent Phillips shared his strong view that a deaf person should not use their deafness as an excuse not to serve. He explained: 'Deaf people have to work hard to get access and should exercise their civic duty once they are able to do so'.³¹
- 16.30 A number of survey respondents also suggested that excuse should occur on the same basis as the rest of the community.³² For example, a survey respondent who identified as blind said:
- A blind person should only be excused on the same basis as everyone else. Given the disproportionate outcomes Victorians with a disability experience in our justice system and the systemic discrimination experienced by many disabled lawyers seeking judicial appointment, it is imperative that more disabled Victorians step up to jury service.³³

Wariness about participating as jurors

- 16.31 While not supporting disability as an excuse by itself, some responses noted that people in the subject groups may lack the confidence to participate as jurors. Alastair McEwin explained:
- However, it must also be remembered that deaf people might not feel confident to do jury duty. Until there is cultural change deaf people will continue to expect less from themselves. ... [as far as I know] there are no deaf role models in Australia of anyone who has served on a jury. Therefore, it will be important for deaf people to see other deaf people doing these roles.³⁴
- 16.32 Deaf Victoria consultation participants commented on the importance of empowering deaf people:
- Often deaf people may feel that it's not important for them to be involved, because they have been systematically undervalued and may feel a sense of lack of ownership of the process. Therefore, creating an environment where they feel responsibility for being involved is important.
- Many deaf people are made to feel that they must rely on others to do things. Empowering deaf people is vital. Being deaf should not be used as an excuse to get out of jury duty.³⁵
- 16.33 Some responses emphasised the importance of letting the person with a disability identify what they can and cannot do.³⁶ One survey respondent commented:
- I think that blind people should be able to excuse themselves from particular cases as they will be best placed to know their ability in terms of being able to assess the evidence accurately.³⁷

30 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

31 Consultation 8 (Brent Phillips).

32 See, eg, Online Survey (Response 15).

33 Online Survey (Response 2).

34 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

35 Consultation 6 (Deaf Victoria and community participants).

36 See, eg, Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers); Online Survey (Response 17).

37 Online Survey (Response 19).

- 16.34 However, others maintained that disability should be a ground for excuse and that flexibility is needed. For example, one survey respondent explained:

I do think that disability is a reasonable ground for jury exemption. Despite the ability of many disabled people to serve on the jury in many different cases, I think it would be unfair to deny them the choice of opting out. Many people with disabilities have additional responsibilities or circumstances which might make jury service laborious, and as such, I think that they should be given the choice on whether they believe jury service is tenable for them.³⁸

Legal representatives

- 16.35 Legal bodies (namely the courts, Juries Victoria, the Office of Public Prosecutions (OPP), the Law Institute of Victoria (LIV), and Victoria Legal Aid (VLA)) made it clear that they did not think that people should be required to serve if they did not feel comfortable serving. Making it hard for people to be excused would make things difficult for the trial judge and for the running of the trial.

- 16.36 Juries Victoria submitted that no change to the existing legislation is necessary:

JV supports maintaining the option for a person within the subject groups to request to be excused or permanently excused from jury service based on their impairments. This requires no change to current legislation, as these options already exist under section 8 and 9 of the Act, respectively.³⁹

- 16.37 In submissions and consultations VLA, the LIV and the OPP stressed the importance of maintaining an option of being excused. The OPP highlighted the importance of affording choice to people from the subject groups about whether or not to serve with adjustments.⁴⁰

- 16.38 Similarly, the County Court submitted that it considers:

it is important for prospective jurors in the subject group to be excused due to their hearing or vision loss, if they wish. This would be similar to the situation for jurors over a certain age or with primary carer responsibilities.⁴¹

- 16.39 The Supreme Court did not offer a view on this specific policy issue, but observed more broadly that:

In hearing excuses the Court considers the importance of a representative jury and the need to ensure a fair trial. Mere inconvenience to an individual is not sufficient reason to excuse. It is however appropriate to consider the extent to which the particular imposition on the individual would impact on their concentration and the discharge of their duty. Some weight must attach to an individual's own assessment of their capabilities, whether that be in their assessment of their capacity to bring an open mind to the case because of a particular experience, or their capacity to engage in all aspects of the jury process with supports.

At whatever stage of the process an individual seeks to be excused there are options to maintain a level of privacy. If the person seeks to be excused on account of their disability but does not wish to reveal the reason in open court, they may write their excuse on a piece of paper after having sworn an oath or made an affirmation.⁴²

Reasons why a person with disability might want to be excused

- 16.40 The following examples were suggested to the Commission as possible reasons why a person from the subject groups may seek to be excused:

- A person has not yet come to terms with recent onset vision or hearing loss.
- A person feels apprehensive about being involved in an unfamiliar process.

38 Online Survey (Response 13).

39 Submission 13 (Juries Victoria).

40 Submissions 10 (Law Institute of Victoria), 11 (Victoria Legal Aid); Consultation 16 (Office of Public Prosecutions Victoria).

41 Submission 14 (County Court of Victoria).

42 Submission 11 (Supreme Court of Victoria).

- One Blind Citizens Australia consultee observed that service might be possible for people who have gone to sighted school but much harder for those who did not or who do not have a good grasp of technology.⁴³
- A person is concerned about being more easily identifiable in the community in a high-profile trial, particularly in a regional area. One person shared their concerns about this:

I have a real concern about standing out and not being able to blend in with other jurors. Country people who are blind or vision impaired tend to be noticed. My concern is serving on a jury and having someone approach me whilst I'm out shopping because they have recognized me from a case and want to express their opinion on the case/verdict. Or abuse me because they didn't agree with the jury's decision.⁴⁴

- A person considers that the adjustments are unsatisfactory. Deaf Victoria consultation participants explained:
If supports are not satisfactory for example if they want captions and the screen provided is too small or not in the right place, or if the interpreters booked are not suitable to work with them. In other words, they would not be excused because they are deaf or hard of hearing, but because the appropriate access tools are not available to allow them to serve as a juror.⁴⁵

- 16.41 The academics we consulted acknowledged that being a deaf juror would be exhausting and cognitively demanding, so some people may not want to serve. However, Professor Napier noted that the deaf people she had spoken to said that the excuse categories should be the same as for the general community, and that many of them felt that they would perform their civic duty just as others are required to.⁴⁶

Excuses should only be available for the consequences of disability

- 16.42 The Commission does not think there should be an excuse as of right for disability. We acknowledge that doing so would make the excuse application process simple for a person from the subject groups. However, this approach reinforces the notion that people in the subject groups do not have the same rights and obligations in civil society as others. Excuse for disability as a right may perpetuate cultural misconceptions that people with disability cannot contribute to society.
- 16.43 The Commission agrees with Juries Victoria's observation that the existing 'good reason' provision in section 8 is broad enough to allow people to be excused by Juries Victoria for reasons relating to the *consequences of their disability* rather than *the disability itself*.⁴⁷ 'Good reasons' include:
- illness or poor health
 - substantial hardship to the person
 - any other matter of special urgency or importance.⁴⁸
- 16.44 The excuse 'for good reason' approach reflects the principle that people in the subject groups have the same rights and obligations in civil society as others. It subverts cultural misconceptions about the capabilities of people with disabilities.
- 16.45 This approach follows the example of the ACT and is in line with the recommendations from other Australian law reform bodies in Western Australia, New South Wales and Queensland. It is also in line with comparable international jurisdictions including the United Kingdom and the United States.

43 Consultation 1 (Blind Citizens Australia).

44 Submission 5 (Name withheld). Similar concerns about personal safety as jurors have been expressed by jurors outside the subject groups: see Chris Vedelago and Adam Cooper, "Weird Things Happen": Inside the Jury Room and Why Sometimes Trials Are Aborted', *The Age* (online, 13 February 2022).

45 Consultation 6 (Deaf Victoria and community participants).

46 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehra San Roque (University of New South Wales)).

47 Consultation 10 (Juries Victoria).

48 *Juries Act 2000* (Vic) s 8(3).

- 16.46 There may be situations where a person's disability is so profound that they may never be able to serve or ever feel comfortable serving as a juror. In this situation, the person should continue to be able to apply to be permanently excused on the grounds of disability.⁴⁹
- 16.47 A person who is permanently excused from jury service can waive that exemption later if they wish.⁵⁰ This provides a safeguard, for example, for circumstances where a person develops a disability later in life and does not feel comfortable serving, but over time becomes accustomed to using adjustments and changes their mind about wishing to serve.

Data should be collected about the reasons for excuse

- 16.48 Data should be retained about when a person from the subject groups seeks to be excused and for what reason. This should include data about adjustments that are offered that are unsatisfactory to the person from the subject groups. This will help to develop Juries Victoria's understanding of what steps it can take to assist people to serve and may encourage future investment in new adjustments.

The excuse process should not be difficult

- 16.49 There should not be an overly burdensome process to seek to be excused for 'good reason'. Vision Australia gave an example:
- if it comes out that there are going to be complex documents submitted in evidence, and a person says that they don't have the skill to read them, they shouldn't have to prove that inability.⁵¹
- 16.50 At present, the Juries Victoria approach is geared towards excusing people in the subject groups. Comments from the Juries Commissioner suggested that Juries Victoria takes a flexible approach to this issue and routinely talks to people about their level of comfort with the idea of serving:
- If the excuse is based on a medical issue, JV will ask for a medical certificate. For any other reason, JV makes individual assessments based on the conversations it has with people ...⁵²
- We deal with these on a case by case basis. Sometimes, a person will call (if vision impaired) and with enough detail of that impairment, we'll excuse them over the phone. Sometimes, a person who is profoundly deaf will use the interpreter service and call, and again, we'll excuse over the phone. If they give sufficient information over the phone and it is clear (by that information) they are unable to do jury service, we'll excuse. Often, they will complete the eligibility form (paper or online) and provided sufficient detail is given, we'll process the application without a medical certificate.⁵³
- 16.51 Juries Victoria advised that they deal with 200,000 people a year and hold one-on-one discussions with many people about special requirements to enable them to serve.⁵⁴

Juries Victoria should provide information about the excuse process

- 16.52 Juries Victoria should publish material explaining the operation of the excuse process for people in the subject groups. This would help to allay concerns about serving. Information about excuse should be included on the Juries Victoria website with information about seeking adjustments. Juries Victoria should encourage and make it easy for people from the subject groups to talk to Juries Victoria about their needs and discuss excuse options.

49 They may apply for permanent excuse under *ibid* s 9(4)(b).

50 *Ibid* s 15.

51 Consultation 7 (Vision Australia).

52 Consultation 10 (Juries Victoria).

53 Information provided by Juries Victoria to Victorian Law Reform Commission, 9 June 2021.

54 Consultation 10 (Juries Victoria).

- 16.53 For example, the Juries Victoria website and the questionnaire could state: 'If you are deaf, hard of hearing, blind or with low vision, you can still serve on a jury if reasonable supports can be provided to enable you to perform your duties. Contact JV ahead of time to discuss what support you might need to attend. If you do not think you will be able to serve because of a reason associated with your disability, you can apply to JV to be excused from jury duty.'
- 16.54 An example of a good reason should be provided on the website; however, a detailed list should be avoided. Examples might include:
- I have recently become blind or deaf.
 - I have recently received new technology/new guide dog and do not presently feel comfortable to serve.
 - I am worried about the idea of having to serve with multiple Auslan interpreters that I do not know.

Recommendation

37. The Juries Victoria website should provide information about the excuse process and provide examples for people from the subject groups.

Clarifying the courts' power to excuse in the Juries Act

- 16.55 In the context of upholding the right to a fair trial, the Supreme Court raised the question of whether section 32(3)(b) of the Act could be exercised on the Supreme Court's own motion.⁵⁵ That section states:
- (3) The court may excuse a person from jury service on the trial if the court is satisfied that the person—
- (b) is unable to serve for any other reason.
- 16.56 The provision applies when jurors have been balloted to a panel and the judge has provided information about the trial to the prospective jurors. The section outlines that after information is provided to the panel the court must call on persons on the panel to identify themselves if they seek to be excused.
- 16.57 It is possible that the power in section 32(3) could be read as only coming into operation if a panel member seeks to be excused. For that reason, we recommend that the legislation is clarified so that it is clear that the court may act on its own motion in the necessary circumstances.

Recommendation

38. The Juries Act should be amended to clarify that section 32(3) may be exercised by the courts on their own motion to excuse a person from the empanelment process for a trial.

Peremptory challenges and stand asides

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17. Peremptory challenges and stand asides

The nature of peremptory challenges is that a defendant does not have to disclose their reasoning. They are often instinctive decisions based on very little information such as appearance, a potential juror's behaviour during empanelment or their occupations.¹

—Law Institute of Victoria

Overview

- A potential juror may be excluded during the jury empanelment process through legal challenges, including 'stand asides' and 'peremptory challenges'. These challenges aim to ensure that the accused receives a fair trial.
- The Commission is concerned that these challenges may be exercised solely based on perceptions about the impact of a person's disability. Excluding people from the subject groups in this way would undermine jury representativeness and the effectiveness of the recommended reforms.
- The Commission does not recommend major changes to the exercise of peremptory challenges and stand asides. The best way to prevent challenges being exercised against people in the subject groups on the basis of misconceptions or stereotypes is through education of the legal profession. In Chapter 18 we also recommend improving community understanding of adjustments and the abilities of people with disabilities.
- If reforms are implemented, data should be collected and analysed to establish whether people in the subject groups are disproportionately challenged and whether further action is needed to address this.

Challenging potential jurors

- 17.1 We consider two types of challenges in this report: 'peremptory challenges' and 'stand asides'.²
- 17.2 Once a panel of potential jurors has been allocated to a trial, the parties (in a civil trial), or the accused and the Crown (in a criminal trial) can challenge potential jurors peremptorily, that is, without giving reasons.³ These challenges prevent a potential juror from serving in the trial. If a person is challenged they return to the jury pool and may be selected for a panel on a different trial.

¹ Submission 7 (Law Institute of Victoria).

² Other challenges are available. A challenge to the array is available at common law and challenges for cause are available under the *Juries Act 2000* (Vic) ss 34, 37. See also Chapter 4.

³ Ibid ss 35, 38, 39. Three peremptory challenges are available to the accused and the Crown in a criminal trial and two to the parties of a civil trial.

- 17.3 Currently, people in the subject groups are unlikely to reach the challenge stage of jury selection because they are excused earlier in the process. If reforms are implemented to enable people in the subject groups to serve with reasonable adjustments, we are concerned that challenges may be used in a discriminatory way to prevent them from becoming jurors.⁴ This would undermine the effectiveness of reform.
- 17.4 It is impossible to conclusively determine how great the risk is of this occurring, because the parties do not have to provide reasons for exercising peremptory challenges or stand asides. However, stereotypes and biases about people with disabilities may play out in the challenge context.
- 17.5 An accused, or the Crown, determines whether a potential juror should be removed based on limited information, namely:
- their number (or sometimes name)
 - current occupation⁵
 - physical appearance
 - demeanour.⁶
- 17.6 A person in the subject groups may be more likely to stand out from other jurors because of their physical appearance or the presence of an adjustment. We understand from our consultations and research that the community and the legal profession may still hold some misconceptions about the abilities of people in the subject groups (see Chapter 9). For these reasons, people with disabilities may be more likely to be challenged on discriminatory grounds.

Peremptory challenges

What is the purpose of peremptory challenges?

- 17.7 The purpose of peremptory challenges is to ensure that the jury is impartial and the trial is fair.⁷ Another purpose is to 'allow the accused in a criminal trial to have some say in who tries them, thereby improving their confidence in the process'.⁸ The right to make peremptory challenges is 'a fundamental right that allows the accused to influence the composition of the jury'.⁹ Case law suggests that the right must not be infringed or be subject to interference.¹⁰ The judge should ensure that the accused understands that they have a right to challenge potential jurors and they know how to exercise that right.¹¹

4 We note that Spencer et al referred to comments by legal professionals that they may use peremptory challenges to remove jurors because including them would add 'an unfamiliar layer of uncertainty to what is an already complex process'. At the same time, Spencer et al concluded that most legal professionals supported removing barriers to jury service for people who are deaf. David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 344-345.

5 In Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 25 [3.36] we explain that: 'Jurors identify their occupation in the questionnaire they complete when initially contacted by the Juries Commissioner's Office (JCO). The JCO then standardises these responses in accordance with the Australian and New Zealand Standard Classification of Occupation Guidelines. If a person is retired, they are asked to list their previous occupation. If a person is a student, they are commonly asked by the trial judge what they are studying. In the rare event that two prospective jurors share the same name and occupation, their identifying numbers are read out to distinguish between them: *Juries Act 2000* (Vic) s 31(2)'.

6 This is evident from the process for empanelment in both criminal and civil trials: see Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 26-27 [3.40]-[3.51].

7 *Johns v The Queen* (1979) 141 CLR 409; (High Court of Australia, Barwick CJ, Gibbs, Stephen, Mason and Murphy JJ, 8 August 1979) [15] (Gibbs J). See Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21 [3.6]-[3.8].

8 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21 [3.7].

9 Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [67] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>.

10 *R v Cherry* [2005] VSCA 89, (2005) 12 VR 122; *Johns v The Queen* (1979) 141 CLR 409.

11 Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) [65] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>, citing *Johns v The Queen* (1979) 141 CLR 409; *R v Harrington* (1977) 64 Cr App R 1, (Court of Appeal, Shaw LJ, Swanwick and Mars-Jones JJ, 17 May 1976).

- 17.8 In 2014 the Commission published its report, *Jury Empanelment*. That report made recommendations about three aspects of the jury empanelment process:
- 1) peremptory challenges and the Crown right to stand aside
 - 2) calling of the panel in court by name or number
 - 3) the use of additional jurors.
- 17.9 The Commission examined whether peremptory challenges should be retained and if so, how they should operate.
- 17.10 The report noted a number of negative aspects of peremptory challenges. However, the Commission concluded that peremptory challenges are necessary. They enhance parties' confidence in the jury, and provide a safeguard in case other processes have failed to remove potential jurors who are biased, unwilling or unable to serve. The Commission recommended retaining peremptory challenges but reducing their number, a change that is reflected in the current law.¹²
- 17.11 Historically, the accused personally exercised peremptory challenges. Reforms following the Commission's report mean that the peremptory challenges can be exercised by the accused's legal practitioner.¹³ The aim of this reform was to respond to the situation where an accused might not be comfortable speaking up in court.¹⁴

The flaws of peremptory challenges

Guesswork about impartiality

- 17.12 In our report on jury empanelment we noted that because jury deliberations in Victoria are confidential, there are no studies that indicate the effectiveness of peremptory challenges in achieving an impartial jury.¹⁵
- 17.13 In *Juries in the 21st Century*, Horan concludes that there is no direct link between juror characteristics and verdict preference.¹⁶ In fact, many studies indicate no link at all. Some studies do indicate a connection between a juror's values and attitudes and verdict preference.¹⁷ But because the jury selection system does not provide practitioners with information about jurors' values and attitudes, Horan concludes that 'it is safe to say that the challenges made by Australian barristers are guesswork'.¹⁸ As Horan recognises, it is 'not possible for a defendant to know whether a citizen is going to be favourable to their defence based on what they look like and their occupation'.¹⁹
- 17.14 Similarly, Findlay and Duff question the usefulness of peremptory challenges to ensure impartiality. They argue that because peremptory challenges are 'based predominantly on appearance, there must necessarily be a large element of arbitrariness' and they are often 'devoid of much logical "substance"'.²⁰

12 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 54–5 [3.249]–[3.260]. The number of peremptory challenges in criminal trials has since been reduced from six to three when there is a single person arraigned, and reduced from three to two for each party in a civil jury trial: *Juries Act 2000* (Vic) s 39(1)(a) and s 35, respectively. If two or more persons are arraigned in a criminal trial, the accused can stand aside two potential jurors each (s 39(1)(b)). The number of jurors who can be peremptorily challenged was reduced by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic).

13 *Juries Act 2000* (Vic) s 39(3). A clerk of a legal practitioner may also exercise the right.

14 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 60 [3.293]–[3.296].

15 *Ibid* 37 [3.122].

16 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 38–42.

17 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 38 [3.129], citing Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 29–42.

18 *Ibid*.

19 Jacqueline Horan, 'All about Juries: Why Do We Actually Need Them and Can They Get It "Wrong"?', *The Conversation* (Online, 7 March 2019) <<http://theconversation.com/all-about-juries-why-do-we-actually-need-them-and-can-they-get-it-wrong-112703>>.

20 Mark Findlay and Peter Duff, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 52.

- 17.15 When interviewed by *The Age* about representativeness of juries and peremptory challenges, barrister and criminal justice spokesperson for the Australian Lawyers Alliance Greg Barns described jury selection as a 'primitive exercise'. He commented that 'it's a hunch you take. You want a jury of a particular type of cohort ... It's all witchcraft, no one does any testing'.²¹
- 17.16 As we noted in Chapter 10, the United States jury selection system is quite different from the Australian system because it includes a 'voir dire' examination.²² Nevertheless, research in the United States has highlighted that the peremptory challenge process is still no better than a guessing game: 'Most of the time, attorneys have little idea how specific jurors are apt to respond to the arguments and evidence they offer at trial'.²³

Peremptory challenges are discriminatory

- 17.17 Jury selection is not directly covered by federal or state discrimination laws in Australia.²⁴ County Court consultees observed that:
- The exercise of a peremptory challenge does not fall within any of the prohibited heads of discrimination (such as the provision of goods and services) under discrimination law. This means that they can be exercised on discriminatory grounds.²⁵
- 17.18 Many judges consulted by the Commission for the jury empanelment report considered reliance on stereotypes about people with certain characteristics to be unscientific and ineffectual in determining whether a prospective juror was suitable. One County Court judge quoted in that report questioned whether the law should continue to facilitate the exclusion of prospective jurors on bases which would amount to prohibited discrimination in other spheres of life.²⁶
- 17.19 Daniel Stubbs told us:
- It is worth thinking about challenges in line with discrimination legislation, both under State and international law. Whether a person can or cannot serve should be determined in line with discrimination law.²⁷

Peremptory challenges undermine representativeness

- 17.20 The main way that the jury system seeks to achieve representativeness is by random selection.²⁸ Discriminatory use of challenges can impact the representative nature of juries by eliminating people with certain characteristics.
- 17.21 In our jury empanelment inquiry we heard from criminal defence practitioners who suggested that peremptory challenges are sometimes used to remove people with disabilities if they may 'undermine their client's prospects of a fair trial'. They aim to exclude those who:
- should have sought to excuse themselves from the panel, for example, because they know the accused or another party, or who appear to have a sensory or other disability that would impede their ability to listen, view or process the evidence in the trial.²⁹

21 Rachael Dexter, Craig Butt, Eleanor Marsh and Nicole Precel, 'Why There Are More Men than Women on Juries', *The Age* (online, 4 December 2019) <<https://www.theage.com.au/national/victoria/why-there-are-more-men-than-women-on-juries-20190821-p52jer.html>>.

22 For further information about peremptory challenges and the *Americans with Disabilities Act*, 42 USC Ch 126 §12132 (1990): see William D Goren, 'Persons with Disabilities and Peremptory Challenges', *Understanding the ADA* (Blog Post, 1 October 2012) <<https://www.understandingtheada.com/blog/2012/10/01/persons-with-disabilities-and-peremptory-challenges/>>. For commentary regarding disability and the use of peremptory challenges: see Matthew J Crehan, 'The Disability-Based Peremptory Challenge: Does It Validate Discrimination against Blind Prospective Jurors' (1997) 25 *Northern Kentucky Law Review* 531.

23 Neil Kressel and Dorit Kressel, *Stack And Sway: The New Science Of Jury Consulting* (Basic Books, 2004) 128.

24 See discussion in Chapter 7. See also Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 37 [3.125].

25 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

26 Judges of the County Court of Victoria, Consultation No 22 to Victorian Law Reform Commission, *Inquiry into Jury Empanelment* (2014), cited in Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 38 [3.128].

27 Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

28 *Juries Act 2000* (Vic) s 4.

29 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 29 [3.62]–[3.63].

- 17.22 In Chapter 5 we noted that peremptory challenges are exercised against women more often than men. While reasons are not provided for exercising peremptory challenges, the data suggests that women are challenged more than twice as often as men.³⁰
- 17.23 The Commission is concerned to avoid a similar outcome for people from the subject groups. There will be little advantage in changing the law if people from the subject groups get challenged off the jury anyway at the last minute.

The approach of other law reform agencies to disability and challenges

- 17.24 The New South Wales Law Reform Commission (NSWLRC) notes that:
- For meaningful change to take place, considerable effort would be required to educate and instil confidence in lawyers and the general public as to the competence of deaf or blind people to serve as jurors. Unless such a perception becomes widespread and not merely patchy, in practice blind or deaf people may well continue to be excluded from juries.³¹
- 17.25 A later NSWLRC report suggested that the issue of peremptory challenges should be 'kept under review'.³² While not specifically addressing the impact on people with disabilities, that report identifies some of the impacts of peremptory challenges that may lead to under-representation of Indigenous people. These impacts include further alienation from the criminal justice system, reduced opportunity for 'the perspective of Aboriginality to be understood by juries' and reduced chances that an accused will be tried by a jury with an Indigenous member.³³

Community responses: peremptory challenges exercised on discriminatory grounds

- 17.26 In the consultation paper we asked for feedback about what action might reduce the likelihood of peremptory challenges being used to exclude jurors solely based on their disability. We suggested some reform ideas for community feedback:
- 1) guidelines for the Victorian Bar outlining that challenges should not be exercised solely on the basis of disability
 - 2) a statement by the judge discouraging the use of challenges on discriminatory grounds.
- 17.27 The courts and legal professionals were wary of interfering with the right to peremptory challenges.³⁴ The community, on the other hand, favoured reform. Only a handful of responses supported both of the reform ideas we suggested.³⁵ Disability advocates and community members did not think it was acceptable to challenge people solely on the grounds of disability and supported taking action to prevent this.³⁶
- 17.28 Daniel Stubbs acknowledged that it 'would be impossible to know on what basis a challenge is being exercised because a reason doesn't have to be given'. However, he also commented:
- The use of challenges could be likened to a form of indirect discrimination and not dissimilar from common misconceptions about disabled people in the workplace ie that they are unproductive and inefficient employees.³⁷

30 See Chapter 5.

31 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Discussion Paper No 46, 2004) 3 [3.55].

32 New South Wales Law Reform Commission, *Jury Selection* (Final Report No 117, September 2007) 181 [10.42] Recommendation 44.

33 Ibid 14 [1.36]–[1.37].

34 Consultations 2 (Law Institute of Victoria), 4 (Victorian Criminal Bar Association), 16 (Office of Public Prosecutions Victoria).

35 Submissions 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)), 9 (Madison).

36 Consultations 1 (Blind Citizens Australia), 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)).

37 Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

- 17.29 Legal professionals were not comfortable with peremptory challenges excluding people with disabilities but did not think that anything could be done about it. Consultees from the Supreme Court told us:
- peremptory challenges are essentially a discriminatory process so it is hard to see how they can really be changed so that people are not discriminated against on the basis of disability.³⁸
- 17.30 Criminal solicitor Peter Ward commented that:
- I support what you are saying (that you shouldn't challenge people in [a] discriminatory way) but there is no effective way to regulate this.
- People might challenge a potential juror on the basis of disability. But people interpret disability in different ways. Some would think you'll be a softie. Others might think you'll be a bit cross about your lot in life and embittered. It is very difficult to make generalisations about this.
- In the current system you don't know why a person has been challenged so there is no way to regulate the exercise of that choice. Everyone hides their prejudice in this process.³⁹
- 17.31 In general, the legal community did not think that it was likely that challenges would be used against people in the subject groups. Consultees from the Victorian Criminal Bar Association told the Commission:
- it would be very unlikely that a peremptory challenge would be used against a disabled person. Now that there are only three peremptory challenges available, you need to be very careful about using them. They are now mainly used for something obvious (eg you wouldn't want an auditor on the jury of a fraud case). It is less likely people would use peremptory challenges for a person with a disability. However, it could be possible to make an application for cause. But the judge could refuse that application.⁴⁰

Does the Bar need guidelines?

- 17.32 The Law Institute of Victoria (LIV) suggested that it 'may be helpful to provide guidelines to the Victorian Bar, which outline that exclusion [via peremptory challenge] should not be on discriminatory grounds'.⁴¹ The LIV noted that the 'benefit of providing such guidelines would be to educate barristers not to adopt discriminatory practices' but that ultimately they were entitled to exercise peremptory challenges as they wish.⁴²
- 17.33 Victorian Criminal Bar Association consultees were not in favour of guidelines for the Bar. However, they noted that when the law changes the Victorian Bar will provide a professional development session about the change, and often someone will write a paper about it. They further commented that the provision of professional development training by the Victorian Bar:
- is especially likely if there are changes to the Juries Act. There have been numerous changes to the law (especially regarding evidence) over the past few years and criminal barristers have had no choice but to keep up to date with these changes. The same is likely to happen here.⁴³
- 17.34 Associate Professors Bruce Baer Arnold and Wendy Bonython were of the view that 'courts should be very wary of unsubstantiated "social sorting" through peremptory challenges' and that amendments to legislation should be 'accompanied by practice guidelines and training [...] to clearly indicate that inclusion is the default position'.⁴⁴

³⁸ Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

³⁹ Consultation 25 (Peter Ward, Partner, Galbally and O'Bryan Lawyers).

⁴⁰ Consultation 4 (Victorian Criminal Bar Association).

⁴¹ Consultation 2 (Law Institute of Victoria).

⁴² Ibid.

⁴³ Consultation 4 (Victorian Criminal Bar Association).

⁴⁴ Submission 4 (Baer Arnold & Bonython).

Should the judge make a statement?

- 17.35 The intended aim of this idea was that a statement by the judge could provide a useful reinforcement of the principles of equity and inclusion. This proposal received limited support.⁴⁵ Most disability advocates did not support a judicial statement because it would draw too much attention to the person with disability.
- 17.36 Legal professionals were opposed to it on the grounds that it would be ineffectual, or at least its effectiveness could not be measured, because:
- the accused does not need to provide reasons for exercising challenges
 - challenges can be exercised on any grounds.
- 17.37 Consultees from the Supreme Court opposed the idea, noting that:
- one or more forms of discrimination would likely be unintentionally left out. The only real way to ensure that peremptory challenges are not used on the basis of misconceptions of the abilities of jurors with hearing or vision loss is to educate the legal profession.⁴⁶
- 17.38 The view of a consultation participant from the LIV was that:
- it might be more practical/beneficial instead to educate barristers, parties, and jurors about the capabilities of a person with a disability to serve as a juror and how supports work. The judge could read out a statement to the Court. Barristers need to better understand that having sensory disability does not mean that the person has any issues with their cognitive abilities. In fact, people who are deaf/blind may well bring unique skills that would benefit a jury. This approach might mean less challenges are made on the ground of disability later on (it might not too).⁴⁷
- 17.39 The view of consultees from the Victorian Criminal Bar Association was that:
- It is probably unwise for the judge to make a comment about not exercising the challenge on a discriminatory ground. It is better not to draw attention to the point at all.⁴⁸
- 17.40 In the United States, where people with disabilities have been serving for decades, no attention is drawn to the person serving with supports.⁴⁹
- 17.41 Consultees from the County Court suggested:
- A simple direction could be given, eg that there is a person with a disability on the [panel] and that accommodations can be made, and the judge is satisfied that they can fully participate. Or that it is permissible for a person with a disability to serve and necessary accommodations have been made. This will avoid embarrassment and be more effective than any other proposed directions about not being discriminatory because, in reality, the nature of peremptory challenges means that the defence is not precluded from applying discriminatory criteria. They may be discriminating for a myriad of reasons that we do not know about.⁵⁰

The law about peremptory challenges should not be changed

- 17.42 In England and Wales peremptory challenges have been abolished with reportedly no detrimental effect.⁵¹
- 17.43 There is, however, little appetite to do away with peremptory challenges in Victoria at present. In our consultations with the courts, representative legal bodies and legal professionals, no support was expressed for challenges to be abolished or

45 Submissions 4 (Baer Arnold & Bonython), 9 (Madison), 10 (Vision Australia).

46 Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

47 Consultation 2 (Law Institute of Victoria).

48 Consultation 4 (Victorian Criminal Bar Association).

49 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

50 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

51 Rodolfo Monteleone, *Improving Efficiency and Effectiveness of the Victorian Jury System* (Report, Winston Churchill Trust, 3 February 2012) 23. See also Lord Justice Robin Auld, Ministry of Justice (UK), *Review of the Criminal Courts of England and Wales* (Report, September 2001) ch 5 [73]–[74] <<https://ials.sas.ac.uk/eagle-i/review-criminal-courts-england-and-wales-right-honourable-lord-justice-auld-september-2001>>.

further reduced.⁵² For example, the LIV submitted that 'it is 'essential that this wide discretion remain without reasons being required, regardless of the perceived basis of peremptory challenges'. To do otherwise would be to 'fundamentally change this process founded in affording a defendant a fair and impartial trial'.⁵³

- 17.44 There is not enough evidence to determine whether peremptory challenges will, in fact, be used to prevent people from the subject groups from serving as jurors. It may also be premature to call for their abolition without assessing the effect of reforms in enabling people to serve with adjustments, and the effect that the lower number of challenges has on jury representativeness.
- 17.45 The Commission takes the view that the suggestions it put forward in the consultation paper—namely, a statement from the judge discouraging the use of challenges on discriminatory grounds or guidelines for the Bar—would not be helpful.
- 17.46 Instead, reform to the Juries Act and practice and procedures, together with practical education about the new laws and disability awareness training, will help to guard against prejudice and misconceptions later in the selection process. Reform will be greatly assisted by leadership from judges.

The judge should give a simple direction

- 17.47 The Commission agrees with the suggestion from County Court consultees that the judge make a brief and simple direction before the exercise of challenges if needed that there is a person from the subject groups on the panel and that adjustments have been made to enable them to serve.⁵⁴ In Chapter 12 we recommended that this statement is made before the panel is brought into the courtroom, so that only counsel and the accused are present. This idea was also supported by the LIV.⁵⁵ It would help to shift misconceptions that may be held by counsel.
- 17.48 This may only be required for a short period, until the concept of people in the subject groups serving on juries becomes more routine. Ultimately, the aim would be to achieve an experience similar to that in the United States, where jurors with disabilities are so commonplace that no attention is drawn to them at all.

The legal profession should be educated about reforms

- 17.49 The best way to reduce the likelihood of challenges being used in a discriminatory way against people in the subject groups is education of the legal profession about the new provisions in the Juries Act and adjustments.⁵⁶ This approach was overwhelmingly supported in community responses.⁵⁷
- 17.50 Most community responses supported education for the legal profession. As the academics involved in the mock trial noted:

Education is essential to addressing and preventing discriminatory use of the peremptory challenges. Counsel would be more mindful of the optics of the challenge if they have been given training on the need not to discriminate.⁵⁸

52 Consultations 2 (Law Institute of Victoria), 4 (Victorian Criminal Bar Association), 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates), 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court), 16 (Office of Public Prosecutions Victoria).

53 Submission 7 (Law Institute of Victoria).

54 Submission 14 (County Court of Victoria).

55 Submission 7 (Law Institute of Victoria).

56 The Commission acknowledges that peremptory challenges can be made by accused persons themselves either without input from their legal representative, or where they are unrepresented, and that education of legal professionals will have no impact in that scenario.

57 Consultations 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)), 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity); Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

58 Consultation 3 (Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)).

- 17.51 Juries Victoria commented in submissions that it:
supports education and training for the judiciary, court and JV staff and the legal profession on the importance of inclusive juries, on respectful interactions with people with vision, hearing or other impairments, and on unconscious bias.⁵⁹
- 17.52 Vision Australia submitted:
In our view, the cumulative impact of continuing education, disability awareness training, explicit guidelines and statements, and a gradual increase in the number of people who are blind or have low vision serving on juries, will be most effective in ensuring that disability is not a factor in exclusions or challenges. It will therefore be essential to include such measures along with legislative reform, since legislation alone is unlikely to be the catalyst for the significant cultural change that is required in the legal profession.⁶⁰
- 17.53 Disability awareness training and practical legal training on the application of the new laws should be provided regularly to legal professionals. These recommendations are discussed in Chapter 18.

Collecting data about peremptory challenges

- 17.54 As the reasons for exercising peremptory and stand aside challenges do not need to be given, it is impossible to know the basis on which these challenges are made.
- 17.55 The Juries Commissioner told us that basic data is recorded about jurors and potential jurors, namely the potential jurors' sex, age and occupation, as well as whether a juror was challenged or not. We can detect some trends about challenges from this data.
- 17.56 It would not be possible to collect data on the number of people peremptorily challenged based on disability because reasons do not have to be given. However, we recommend that Juries Victoria collects data on the number of people who request adjustments to serve, and the number who are provided with those adjustments but are peremptorily challenged during the empanelment process. This will provide an insight into whether people in the subject groups are disproportionately challenged, the effectiveness of law reform and the representativeness of Victorian juries.
- 17.57 A longitudinal survey could be conducted asking counsel about the effect of changes and requesting information about challenges exercised on the basis of disability (and other factors).
- 17.58 The issue of the discriminatory use of peremptory challenges and stand asides should be reconsidered after the new provisions have been in operation for five years. We discuss the review of new legislative provisions in Chapter 19. This will allow sufficient time to see how the new laws are working and what effect the reduction in the number of peremptory challenges and stand asides is having on jury representativeness.

Recommendations

39. When a person from the subject groups is on a jury panel, the judge should inform the court, in the presence of the accused and counsel, but before the jury panel enters, that it is permissible for a person from the subject groups to serve and necessary adjustments have been made to enable them to do so.
40. Juries Victoria should retain data on the number of people who request adjustments to serve and the number who are provided with those adjustments but are peremptorily challenged during the empanelment process.

Stand asides

- 17.59 The Crown's power to stand aside potential jurors is exercised differently to peremptory challenges.⁶¹ Stand asides ensure that the jury is impartial, and the trial is fair and conducted according to law.⁶² Unlike the defendant's exercise of peremptory challenges, the Crown cannot challenge a potential juror to produce a 'favourable' jury.⁶³ The Crown can only challenge a potential juror if their inclusion on the jury would undermine the jury's integrity.⁶⁴
- 17.60 In the jury empanelment report we recommended that the Crown should continue to be able to stand aside potential jurors in criminal trials because stand asides are 'an important safeguard to ensuring a competent and impartial jury'.⁶⁵ It was recommended that the number of stand asides available be equal to the total number of peremptory challenges.⁶⁶ The number of stand asides in criminal trials has since been reduced to three, equal to the peremptory challenges available to a single accused.⁶⁷

Crown policy guides the exercise of stand asides

- 17.61 The Victorian Director of Public Prosecutions (DPP) has a policy on the exercise of the stand aside power. The policy states that the Crown 'must never use its power to stand aside a potential juror based on factors such as age, sex, occupation, ethnic origin, religion, marital status or economic, cultural or social background'.⁶⁸ This list does not prohibit the use of stand asides based on disability. According to the policy, stand asides are to be used sparingly. The Crown's paramount concern is that the jury is impartial and that it complies with the Act.⁶⁹ Examples included in the guidelines are situations where the potential juror knows a participant of the trial, or where it is reasonably apprehended that the potential juror will be biased, or demonstrates behaviour such as hostility towards court procedures.⁷⁰
- 17.62 The Commission has considered whether 'disability' (or some other language that applies specifically to people in the subject groups) should be added to the list of characteristics in the DPP policy, and whether that would help to prevent stand asides being used discriminatorily against potential jurors from the subject groups.

Stand asides appear less likely to be used in a discriminatory way

- 17.63 In consultations, the OPP and the Supreme Court noted that stand asides are used rarely,⁷¹ and much less frequently and with more restrictions than peremptory challenges. Our jury empanelment report noted that in 2012–2013 only 76 stand asides were made compared to 2405 peremptory challenges.⁷² The Juries Commissioner has told us that 49 people were stood aside in 2018 and 62 in 2019, far fewer than those who were peremptorily challenged (1082 in 2018 and 1108 in 2019).⁷³

61 In her second reading speech of the Juries Bill in 2000, the Hon MR Thomson commented: 'In 1993 the previous government abolished the longstanding distinction between the right of the accused in a criminal trial to challenge persons during the selection of the jury, and the prosecution's power to stand aside persons where necessary in the interests of justice. Those amendments meant that both prosecution and defence were exercising what was to be known as a right of peremptory challenge. This created the misleading impression that the prosecution has the same right as the accused to have persons excluded from the jury. It is important that the role of the prosecution during the jury selection process – namely, to seek the exclusion of persons only where necessary in the interests of justice – be clearly distinguished. Accordingly, the bill reinstates the Crown right of stand aside, but limits the number of stand-asides allowed to the same number of peremptory challenges available to the accused': Victoria, *Parliamentary Debates*, Legislative Council, 22 March 2000, 420 (Marsha Thomson).

62 Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Report, 24 January 2022) 19 [52]–[54]. However, aside from these guidelines, there is nothing restricting the use of stand asides: see *Katsuno v The Queen* [1999] HCA 50, (1999) 199 CLR 40, 58 (Gaudron, Gummow and Callinan JJ).

63 See generally Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21–2 [3.9]–[3.16].

64 Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Report, 24 January 2022) [53].

65 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 52 [3.243].

66 Ibid xv, Recommendation 5.

67 *Juries Act 2000* (Vic) s 38. If two or more persons are arraigned, the Crown can stand aside two potential jurors for each person arraigned: at s 38(1)(b). The number of jurors who can be stood aside was reduced by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic).

68 Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Report, 24 January 2022) [52]. See also Director of Public Prosecutions (Cth), *Guidelines and Directions Manual* (Jury Issues, Guide, 10 September 2012).

69 Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Report, 24 January 2022) [52].

70 Ibid [53].

71 Consultation 11 (Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court).

72 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 29 [3.65].

73 Information provided by Juries Victoria to Victorian Law Reform Commission, 8 September 2021.

- 17.64 Considering this guiding policy, it appears less likely that stand asides will be used in a discriminatory way against people in the subject groups than peremptory challenges. The OPP referred to its common law duty to act as a 'model litigant'.⁷⁴ The Victorian model litigant guidelines, originally issued in 2001 and revised in 2021, set standards for how the state should behave as a party to legal proceedings.⁷⁵ Being a model litigant requires that the state and its agencies, as parties to litigation, 'act with complete propriety, fairly and in accordance with the highest professional standards'.⁷⁶

The legal profession's view: stand asides

- 17.65 The OPP, the County Courts and Juries Victoria thought that the DPP's stand aside policy should remain unchanged.⁷⁷ County Court consultees suggested that it would be a matter for the OPP to consider changing its guidelines.⁷⁸ Juries Victoria submitted that it 'does not feel peremptory challenges and stand asides should be altered in response to the inclusion of persons in the subject groups in the jury process'.⁷⁹

- 17.66 The OPP pointed to another consideration:
because disability is so broad, and because disability can be overcome with supports which does not apply to age, gender, religion etc. Removing the power of the OPP to stand aside might actually create an issue for the person with a disability.⁸⁰

- 17.67 The example the OPP provided was if the potential juror could fulfil the role of juror with reasonable adjustments, but felt extremely anxious about doing so, and the judge refused to allow them to be excused. In this situation a stand aside could be used to overcome the decision of the judge.⁸¹

- 17.68 Ultimately, the OPP concluded that, regardless of what is contained in the policy, it would be 'very unlikely that a stand aside would be used solely on the grounds of disability because it would be contrary to model litigant principles'.⁸²

- 17.69 There was limited community support for amending DPP guidelines for stand asides to expressly state that disability is not a ground for the exercise of stand asides.⁸³ These views were mostly based on the overarching view that people with disabilities should not be discriminated against. Vision Australia commented:

Our strong view is that the guidelines must emphasise that disability is not a legitimate ground for a stand aside. Even though it would be difficult to monitor the effectiveness of such a guideline in practice, we believe that it would complement other measures aimed at creating a more inclusive culture in the jury system.⁸⁴

The Commission's conclusion: the DPP's guiding policy should change

- 17.70 Despite stand asides being rarely used and the Crown's obligation to act as a model litigant, the Commission's view is that the DPP's guiding policy should be amended to guard against the discriminatory exercise of the challenge in relation to people in the subject groups and to educate the profession and to bring the policy in line with the law (once amended).

74 Ibid. See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342, (High Court of Australia, Griffith CJ, Barton and Isaacs JJ, 21 October 1912); *Kenny v State of South Australia* (1987) 46 SASR 268, 273, (Supreme Court of South Australia, King CJ, 27 May 1987); *Yong v Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155, (Federal Court of Australia, Beaumont, Burchett and Goldberg JJ, 6 June 1997).

75 Department of Justice and Community Safety (Vic), 'Victorian Model Litigant Guidelines', *Victoria State Government* (Web Page, 22 July 2021) <<https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines>>.

76 Ibid.

77 Submissions 13 (Juries Victoria), 14 (County Court of Victoria).

78 Consultation 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates).

79 Submission 13 (Juries Victoria).

80 Consultation 16 (Office of Public Prosecutions Victoria).

81 Ibid.

82 Ibid.

83 Submissions 4 (Baer Arnold & Bonython), 9 (Madison), 10 (Vision Australia).

84 Submission 10 (Vision Australia).

- 17.71 The OPP made the following comment about amending the guiding policy:
- The paramount concern of the OPP in this area is ensuring that the accused person receives a fair trial. Accordingly, we would consider amending the Director's Policy to include 'vision/hearing loss' as a reason not to stand aside a juror. However, it would be premature to do so without the legislative and other infrastructural support necessary for an accused person to receive a fair trial with a significantly vision or hearing-impaired person on the jury.⁸⁵
- 17.72 The Commission acknowledges that there will be drafting challenges because we are only recommending that the policy is altered to apply to people who are deaf, hard of hearing, blind or who have low vision. The difficulty will be ensuring that the policy does not become so long that it is disregarded. We are confident these drafting challenges can be overcome.

The importance of education in addressing discrimination

- 17.73 As Daniel Stubbs noted in consultation: 'Education is very important'.⁸⁶ In Chapter 18 we recommend disability awareness training and professional development for legal professionals. The goal of training for the OPP should be to educate prosecutors, to reduce the chances of stand asides being exercised in a discriminatory way against people in the subject groups. Training should include information about the types of adjustments that are available, and how they work in practice, and tackle misconceptions and a lack of understanding about the tools that people with disabilities use to navigate and participate in community life.
- 17.74 The OPP referred to the profession's progress and adaptability in consultation:
- The legal profession has come a long way in the last ten years and we have demonstrated how adaptable we are. There are so many witnesses and victims who use supports. They are listened to respectfully and their views are considered and taken into account in the justice process. In practice the profession runs with it and does not discriminate. The profession has come a long way and so has the use of supports in the court room.⁸⁷
- 17.75 As noted above, judges could also have a role in providing information to Crown prosecutors, as the County Court recommended in its submission.⁸⁸

Collecting data about stand asides and people in the subject groups

- 17.76 For the same reasons outlined in relation to peremptory challenges, the OPP or Juries Victoria should collect data about the use of stand asides to remove potential jurors from the subject groups.

Recommendations

41. The Department of Public Prosecutions' policy should be amended to specifically provide that stand asides should not be used against people in the subject groups on the basis of disability.
42. Juries Victoria should retain data on the number of people who request adjustments to serve and the number who are provided with those adjustments but are stood aside during the empanelment process.

⁸⁵ Consultation 16 (Office of Public Prosecutions Victoria).

⁸⁶ Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

⁸⁷ Consultation 16 (Office of Public Prosecutions Victoria).

⁸⁸ Submission 14 (County Court of Victoria).

CHAPTER 18

Encouraging change in the legal profession and the community

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18. Encouraging change in the legal profession and the community

*The best way to address misconceptions about the ability of people with disabilities to serve as jurors, is just to get on and do it.*¹—Daniel Stubbs

Overview

- The legal profession would benefit from disability awareness training and education about new laws and processes.
- The public needs accessible information about how the new laws operate.

Cultural change is needed for legal reform to be effective

- 18.1 In Chapter 9 we identified concerns about whether people who are deaf, hard of hearing, blind or have low vision are capable of serving as jurors. Some people believe that people in the subject groups are incapable *because of* their disability. Some views are grounded in discriminatory beliefs and misconceptions about people with disabilities.²
- 18.2 Consultees from the Victorian Criminal Bar Association recognised:
- There are wide prejudices against disabled people within the legal community. Allowing deaf/blind people onto juries is similar to allowing women to sit on juries. Similarly, a bureaucrat may say 'Ahh but we don't have the facilities' (as they did with women) but that just isn't good enough.³
- 18.3 Alastair McEwin suggested that misconceptions arise for a range of reasons, including the social isolation of deaf people from hearing people. He observed that:
- When empanelling juries, a lot of assumptions are made about people's abilities. But that comes from a lack of understanding or a misconception of people's abilities, not an actual lack of ability in many cases.⁴

¹ Consultation 22 (Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity).

² See, eg, the discussion in David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 341.

³ Consultation 4 (Victorian Criminal Bar Association).

⁴ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

- 18.4 We also explored the concerns of legal professionals about the accuracy and equivalency of Auslan-interpreted evidence⁵ and the training and qualifications of Auslan interpreters in Chapter 9.⁶ Concerns have also been raised about having a 13th person in the jury room.⁷
- 18.5 Research examining the feasibility of jury service for deaf jurors and long-standing overseas practices facilitating jury service with adjustments may not be well known in the legal community. Sometimes concerns about reform arise because of a lack of understanding about how adjustments work in practice to enable jury service. Recommendations in Chapters 14 and 15 aim to improve the understanding amongst legal professionals of Auslan interpretation and training requirements, making clear the standards expected of Auslan interpreters and support persons when working with jurors from the subject groups.
- 18.6 Reforms also aim to address fair trial concerns about the use of reasonable adjustments by jurors to perceive and comprehend certain types of evidence. Recommendations in Chapters 11 and 12 provide for judicial oversight and assessment of the provision of reasonable adjustments.
- 18.7 To ensure that reform is effective, Alastair McEwin suggested that both informal and formal change is needed.⁸ A judge, the Juries Commissioner and counsel (as well as the accused) have the power to prevent a person from the subject groups from being a juror at various points in the jury selection process, so it is important to tackle any general misconceptions and improve understanding of practice and procedure. In this chapter we consider three ways this can be achieved:
- 1) disability awareness training
 - 2) professional development for legal professionals, court staff and Juries Victoria about how new laws will work in practice
 - 3) internal protocols for Juries Victoria and the courts to provide guidance about the operation of new laws and procedures.
- 18.8 This chapter also considers ways to improve community understanding of the new laws and encourage people in the subject groups to serve as jurors.

Disability awareness training for the legal profession

People in the community—and especially judicial officers and legal practitioners—might not fully appreciate how sophisticated and effective contemporary accessible format/audio description production has become.⁹—Online survey response

- 18.9 Disability awareness training 'focuses on promoting an awareness of disability and the impact that societal attitudes and inherent stigma and discrimination have on the lives of people with disability'.¹⁰ It aims to inform and improve knowledge of legal obligations, policies and procedures that are relevant to people with disabilities under the Victorian Charter of Human Rights, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), and other discrimination and equal opportunity laws; and to address conscious and unconscious bias towards people with disabilities.

5 David Spencer et al. 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 332, 341–3.

6 Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 26.

7 Ibid.

8 Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

9 Online Survey (Response 2).

10 'Disability Awareness', *Disability Awareness Courses* (Web Page, 2022) <<https://disabilityawareness.com.au/elearning/disability-awareness/>>. See also 'Disability Awareness Programs', *Diversity Australia* (Web Page) <https://www.diversityaustralia.com.au/training/disability_awareness/>.

- 18.10 It is important to tackle attitudinal and practical obstacles that combine with a person's abilities to create disadvantage or exclude them from jury selection. Disability awareness training should have a practical focus and cover the range of adjustments that will break down barriers to participation.
- 18.11 Youth Disability Advocacy Service (YDAS) suggested that disability awareness training 'should be happening regardless of this project. It should already be occurring for anyone involved in the court process because people with disabilities are already regularly involved in those processes'.¹¹ In its submission Victoria Legal Aid (VLA) noted that 'over one quarter of VLA clients across Victoria disclose having a disability or experiencing mental health issues'.¹² Disability awareness training will assist with the implementation of the recommendations in this report and with improving the experience of people with disabilities in the justice system more broadly.

Community responses: disability awareness training is important

*It upsets me when people assume that because you have one disability it stands to reason that you will not have the ability to think or clearly plan alternate ways of achieving a suitable outcome.*¹³—Online survey response

- 18.12 Community responses strongly supported the need for disability awareness training for those who will administer the new laws, Juries Victoria and the judiciary and court staff, as well as the Office of Public Prosecutions (OPP) and counsel.¹⁴
- 18.13 Juries Victoria submitted that it 'supports education and training for the judiciary, court and Juries Victoria staff and the legal profession on the importance of inclusive juries, on respectful interactions with people with vision, hearing or other impairments, and on unconscious bias'.¹⁵
- 18.14 The County Court commented:
- The Court considers training to be essential for judicial officers, court staff and Juries Victoria staff. Training would mitigate the risk of well-meaning questions being asked or comments being made in relation to a person with a disability that are unintentionally offensive or discriminatory. Such questions or comments may result in embarrassment or other feelings of alienation for the prospective juror. Contractors with specialised expertise in disability awareness may be considered suitable to provide such training.¹⁶
- 18.15 The Juries Commissioner further commented that he:
- fully supports the provision of Disability Awareness Training for judicial officers, court and JV staff and the legal profession. While we will leave it to the relevant bodies to determine the best method of delivering this training, JV believes that, in our own case, training should be provided quarterly.¹⁷

11 Consultation 17 (Youth Disability Advocacy Service (YDAS)).

12 Submission 8 (Victoria Legal Aid).

13 Online Survey (Response 1).

14 Submissions 7 (Law Institute of Victoria), 8 (Victoria Legal Aid); Consultations 9 (Consultation with two Victorian County Court Judges, Court policy staff and two Associates), 17 (Youth Disability Advocacy Service (YDAS)), 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

15 Submission 13 (Juries Victoria).

16 Submission 14 (County Court of Victoria).

17 Submission 13 (Juries Victoria).

18.16 Vision Australia commented:

We strongly support initiatives such as disability awareness training. This training could mostly be delivered via e-learning, with content developed and validated by the blindness and low vision sector. There may be a need for some training to be delivered face-to-face, especially for people providing direct support and who would need to be familiar with how to safely guide a blind person and other basic orientation and mobility techniques. Experience has shown that disability awareness training can lead to transformations in the way participants understand disability and their appreciation of the contributions that people with disability can make in all areas of society.¹⁸

18.17 Associate Professors Bruce Baer Arnold and Wendy Bonython submitted:

training will serve two functions. It will firstly signal that courts, tribunals and Justice Victoria staff have a substantive commitment to inclusiveness. Secondly, it will allay potential anxieties or misunderstandings among staff, something that will translate into their lives outside justice administration settings. An understanding of the challenges many people face and an affirmation of their capacity in addressing those challenges should assist staff in dealings with peers on the tram, at the beach, at the supermarket or at the kids' school rather than merely in their professional lives.¹⁹

18.18 YDAS noted that a 'holistic approach should be adopted to create legal reform to ensure juries are inclusive. Recommendations should include disability awareness training for the courts and Juries Victoria. This will help ensure young people with disabilities feel comfortable in the legal space'.²⁰

18.19 One survey respondent commented:

as a general rule I find judicial officers and legal practitioners have very low levels of knowledge about discrimination law and Australia's obligations under the CRPD. Melbourne Law School has only recently added disability human rights law subjects to its programs and many other law schools are yet to do so. To my knowledge Victoria does not have even one judge or Tribunal member with a disability (even in the VCAT Guardianship List) and there are no disabled Commissioners at the VLRC [Victorian Law Reform Commission] despite the massive over-representation of disabled Victorians in our prisons.²¹

18.20 The Commission is pleased that some legal practitioners are already receiving disability awareness training. The OPP told us that disability awareness training is provided to OPP staff. Crown Prosecutors can also attend. For example, in late 2020 the OPP held a training session, 'Practical and effective ways of working with people with disabilities' which covered inclusion and discussed feedback from court users about best practice. The OPP supported disability awareness training for court and Juries Victoria staff and lawyers with the aim of ensuring that reform is effective.²²

Other calls for awareness training

18.21 The New South Wales Law Reform Commission (NSWLRC) and the Western Australian Law Reform Commission (LRCWA) have also called for disability awareness training for legal professionals involved in the jury system.²³

18 Submission 10 (Vision Australia).

19 Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

20 Consultation 17 (Youth Disability Advocacy Service (YDAS)).

21 Online Survey (Response 2).

22 Consultation 16 (Office of Public Prosecutions Victoria).

23 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 61; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Final Report Project No 99, April 2010) 107–8, Recommendation 57.

- 18.22 The provision of disability awareness training is in line with *Australia's Disability Strategy 2021–2031*, which states:

Effective access to justice for people with disability requires consideration of individual needs. Without this there can be no equitable or equal participation. This requires appropriate strategies, including aids, equipment, and accessible legal information and advice to facilitate equal and effective participation in all legal proceedings. In addition, greater awareness of disability is needed among some parts of the judiciary, legal professionals and court staff.²⁴

- 18.23 The Law Council of Australia outlined a range of systemic and structural barriers to justice for people facing significant economic and other disadvantage, including people with disability. In its report *The Justice Project* the Law Council concluded that:

People with disability face negative stigma and discrimination both in society generally and in the justice system. Inadequate disability training perpetuates misconceptions about disability and entrenches stigma. It also leads to a failure by justice system personnel, including lawyers, judges, police officers and corrections, to identify disability and thus appropriately respond to an individual's disability-related needs.²⁵

- 18.24 The provision of disability awareness training is in keeping with the recommendations of the United Nations Committee on the Rights of Persons with Disabilities (Convention Committee). In the three cases in which Australia was found to have breached its duties under the CRPD in regard to deaf jurors, the Convention Committee noted Australia's obligation to take measures to avoid similar violations in the future, including by ensuring that:

appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to local authorities, such as the Sheriff, and the judicial officers and staff involved in facilitating the work of the judiciary.²⁶

- 18.25 Comments from deaf jurors in Monroe County, New York State, suggested that they would like to see 'greater training for the courts about what it means to be deaf and access proceedings via an interpreter'.²⁷

Conclusion: disability awareness training should be required

- 18.26 Disability awareness training should be required for judges, court officers and Juries Victoria staff, the Victorian Bar and lawyers, to encourage cultural change. The OPP should continue to deliver disability awareness training to staff and incorporate specific training on the topic of jury service. It may be possible for disability awareness training to be included in specialist accreditation schemes for legal professionals.²⁸ In Chapter 15 we also suggested that new accessibility officers should receive disability awareness training.

24 Department of Social Services (Cth), *Australia's Disability Strategy 2021–2031* (Report, December 2021) 17, Policy Priority 5.

25 Law Council of Australia, *Introduction and Overview* (The Justice Project, Final Report, August 2018).

26 Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [8] (*JH v Australia*). Identical recommendations were made in a further two cases: Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) (*Beasley v Australia*); Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) (*Lockrey v Australia*). See also *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 8.

27 Comments identified in Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022) 267.

28 For example, Victoria Legal Aid only briefs barristers on the Criminal Trial Preferred Barrister List for major criminal trials (unless an exemption is granted). To be on the Criminal Trial Preferred Barrister List, barristers must hold an Indictable Crime Certificate accreditation from the Victorian Bar. Potentially, some questions regarding the use of adjustments to facilitate participation of jurors from the subject groups could be included in the test to obtain the Indictable Crime Certificate: see 'Criminal Trial Preferred Barrister List', *Victoria Legal Aid* (Web Page, 25 January 2022) <<https://www.legalaid.vic.gov.au/criminal-trial-preferred-barrister-list>>; 'Victorian Bar to Introduce Accreditation for Criminal Trial Barristers', *Victorian Bar* (Web Page, 31 October 2014) <<https://www.vicbar.com.au/news-events/victorian-bar-introduce-accreditation-criminal-trial-barristers>>.

- 18.27 The Judicial College of Victoria has noted that if 'Auslan interpreters were to be used to facilitate jury service for people who are deaf, the Judicial College would likely incorporate awareness raising around this in its annual programming education. Subject to resourcing, the College could develop an education and training program for judicial officers incorporating a face-to-face component that would allow judicial officers to experience the use of an Auslan interpreter in a simulated court setting'.²⁹
- 18.28 The practical aspects of disability awareness training should:
- draw attention to the spectrum of disability and differing needs
 - expose the profession to people with disabilities and provide an opportunity for the profession to interact with and ask questions of people with disabilities
 - have a practical focus and provide an overview of key adjustments and a demonstration of how they work in practice
 - discuss potential challenges for the prospective juror or the court, for example, line-of-sight requirements for Auslan interpreters.

Involving people with disabilities

- 18.29 Disability awareness training should be prepared and delivered in partnership with disability advocacy organisations. It should occur on a regular basis, perhaps every two years. YDAS suggested that young people should also be involved in the design of this training.³⁰

Recommendations

43. Disability awareness training should be required for judiciary, Juries Victoria staff, court staff, counsel and lawyers likely to work with juries.
44. Disability awareness training should have a practical focus and be developed and delivered in collaboration with peak advocacy organisations representing people from the subject groups.

Professional development about the new laws for the legal profession

- 18.30 To ease concerns about changes to law and practice, we recommend that professional development training is provided about how the new laws will work in practice. This should form part of existing training modules and should be provided by:
- Juries Victoria (for its own staff)
 - the Judicial College (for judges)
 - the Victorian Bar (for barristers)
 - Juries Victoria in partnership with the courts (for court staff, accessibility officers and support persons)
 - the Office of Public Prosecutions for Crown prosecutors and solicitors who prosecute criminal offences
 - the Law Institute of Victoria (for solicitors involved in jury trials)
 - Victoria Legal Aid.
- 18.31 Training on the reforms could also be incorporated into practical legal training courses run by the College of Law and Leo Cussen Centre for Law.

- 18.32 The content of this training should be matched to the needs of the recipients. In Chapter 14, we recommended that the Judicial College provides training on the Recommended National Standards for Working with Interpreters in Court (RNS). Judges should also be briefed about likely courtroom adjustments, including about line of sight requirements.
- 18.33 Some adjustments are already provided in court for witnesses and parties and are outlined in the *Disability Access Bench Book*.³¹ Information on working with interpreters (but not specifically about the RNS) is included in the *Disability Access Bench Book*.³² The Judicial College of Victoria features the RNS on its website.³³ We agree with VLA's suggestion that the *Disability Access Bench Book* 'could be updated to specifically address accessibility and supports for jurors who are deaf, hard of hearing, blind or have low vision'.³⁴

Internal protocols should be developed about the new laws

- 18.34 Juries Victoria, in partnership with the courts, should develop internal protocols to guide court and Juries Victoria staff about the operation of new laws and procedures.
- 18.35 Protocols of this kind have been developed in England and Wales and the Australian Capital Territory (ACT).³⁵ Juries Victoria and the courts should consult with the ACT Court and Her Majesty's Courts and Tribunal Services (HMCTS) to develop its internal protocol.
- 18.36 Key information to be included in the protocol would be:
- an overview of key roles and responsibilities: Auslan interpreter, support person, accessibility officer, jury foreperson.
 - what information is provided to the person summonsed about asking for adjustments
 - the definition of a reasonable adjustment, with examples of common adjustments and how they work.
 - what to do if a person wants to bring their own technology to court
 - how Juries Victoria is notified of the need for an adjustment (and the steps it needs to take to record those adjustments in its database)
 - pre-court visits
 - excuse and deferral options for people in the subject groups
 - examples of common courtroom adjustments and how to facilitate them
 - who to direct enquiries to in Juries Victoria and Court Registries
 - court expectations of Auslan interpreters and supporters: code of conduct, standards and oaths
 - tips for booking Auslan interpreters and service provider information
 - template forms
 - anonymised examples of jurors who had served with reasonable adjustments.

31 Judicial College of Victoria, '4.4 Planning—Accessibility Checklist', *Disability Access Bench Book* (Online Manual, 1 December 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

32 Judicial College of Victoria, *Disability Access Bench Book* (Online Manual, 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>: see chs 5.6.1, 5.9, 7.6; Information provided by Judicial College of Victoria to Victorian Law Reform Commission, 5 July 2022.

33 'Recommended National Standards for Working with Interpreters in Courts and Tribunals', *Judicial College of Victoria* (Web Page, 28 April 2022) <<https://www.judicialcollege.vic.edu.au/news/recommended-national-standards-working-interpreters-courts-and-tribunals>>. On the prohibition of the use of Auslan interpreters in the jury room: see generally Judicial College of Victoria, '5.26.1 Eligibility of jurors', *Disability Access Bench Book* (Online Manual, 1 December 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>; Judicial College of Victoria, '11.1 Selecting a Jury', *Victorian Criminal Proceedings Manual* (Online Manual, 30 August 2021) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>>. The Judicial College of Victoria told us that if 'there are reforms to Victorian law to permit interpreters in the jury room, we would update these'. Information provided by Judicial College of Victoria to Victorian Law Reform Commission, 5 July 2022.

34 Submission 8 (Victoria Legal Aid).

35 Information provided by Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 15 September 2021; information provided by ACT Sheriff to Victorian Law Reform Commission, 18 September 2020.

- 18.37 It would also be helpful if the protocols contained a procedure map detailing when various steps occur in relation to the jury selection process, for example:
- a visit to the court before the summons date
 - preliminary report from Juries Victoria
 - judge consideration—on the papers or hearing
 - direction from a judge, if adjustments cannot be reasonably provided or there are doubts about capacity
 - empanelment process.
- 18.38 Juries Victoria may need additional protocols outlining the steps to take before service and what to do on the first day of service.

Recommendations

45. Professional development training should be provided to the judiciary, legal professionals and Juries Victoria about the way that new laws will work in practice.
46. Juries Victoria, in consultation with the courts, should develop internal protocols to guide its own staff and court staff about the implementation of new laws. These protocols should include practical examples.
47. The *Disability Access Bench Book* should be updated to include information about new laws.

Information for the community about reforms

The public will only know what blind/visually impaired people are capable of when we show them what we can do. If the public don't have any contact with blind/visually impaired people, they don't know what tools are available to help blind people undertake the same tasks as sighted people.³⁶
 —Participant in the Blind Citizens Australia consultation

- 18.39 Members of the community will need to be informed about the reforms recommended in this report. People in the subject groups may also be unfamiliar with what is involved in jury service and not confident about participating.

Improving community knowledge of disability

- 18.40 Consultation participants told us that disability awareness and understanding of adjustments, such as Auslan interpreters, has improved in the community over the last few years. In Chapter 7 we note that we are now accustomed to seeing Auslan interpreters at press conferences and public events.³⁷ Della Goswell observed that:
- Public awareness has increased with more exposure to Auslan interpreters through emergency announcements and COVID-19 briefings etc. Auslan class enrolments have risen sharply as a result.³⁸
- 18.41 However, Ms Goswell further commented that:
- Most people in the community have very little first-hand experience of deaf people. Historical references to 'deaf and dumb' has meant that people often think that deaf people are unable to use their voice and are of low intelligence.³⁹
- 18.42 There is still a lack of in-depth understanding in the community regarding the abilities of people from the subject groups. Participants in our consultation with Deaf Victoria told us that in the broader community:
- There is an underlying attitude that deafness equates to 'can't'. However, the ability to hear is different from the ability to understand and comprehend.⁴⁰
- 18.43 In 2008, the Victorian Office for Disability commissioned research into community attitudes towards disability. It found that attitudes towards people with a disability are steadily improving, with a significant decrease in the number of people who report feeling sorry for people with a disability, from 71 per cent in 2001 to 57 per cent in 2008. Respondents believed that community attitudes had improved but acknowledged that there was still a long way to go.⁴¹
- 18.44 To address a lack of knowledge in the community about the abilities of people in the subject groups, there should be a public education campaign about new laws.⁴² This would be in line with Australia's obligations under the CRPD, to 'combat stereotypes, prejudices' and 'promote awareness of the capabilities and contributions of persons with disabilities'.⁴³
- 18.45 New laws should be publicised by government and advocacy organisations while promoting the rights of people with disabilities to participate in community life on equal terms. Advocacy organisations should publicise new laws in their newsletters and on their social media pages. Juries Victoria and the courts should provide updates about new laws on their websites.
- 18.46 We note that care must be taken in the production of this educative material to avoid juror identification. All training and publicity must not breach the obligations in Part 10 of the Act.⁴⁴

37 Zach Hope, "But Seriously, I'm Really Nervous": The Everywhere Faces of Auslan Interpreters and Their Vital Work', *The Age* (online, 10 May 2020) <<https://www.theage.com.au/national/victoria/but-seriously-i-m-really-nervous-the-everywhere-faces-of-auslan-interpreters-and-their-vital-work-20200509-p54rcu.html>>; Holly Tregenza, 'The Coronavirus Pandemic and Bushfire Emergency Have Thrust Auslan Interpreters into the Spotlight', *ABC News* (online, 11 April 2020) <<https://www.abc.net.au/news/2020-04-11/coronavirus-bushfires-thrust-auslan-interpreters-into-spotlight/12140824>>.

38 Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

39 Ibid.

40 Consultation 6 (Deaf Victoria and community participants).

41 Department of Planning and Community Development (Vic), *Community Attitudes Towards Disability* (Report, 2008), cited in Council of Australian Governments, *National Disability Strategy 2010–2020* (Report, 2011) 37.

42 A public education campaign was supported by Dr Baer Arnold and Dr Bonython who also stressed that the best advocates for inclusion are those who serve under new laws: Submission 4 (Baer Arnold & Bonython).

43 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 8.

44 *Juries Act 2000* (Vic) pt 10.

Encouraging people in the subject groups to participate on juries

- 18.47 We were told that people from the subject groups may be hesitant to be jurors because they have been excluded for so long. One consultation participant from Expression Australia noted that:
- because deaf people suffer systemic disadvantage, they might not feel they are capable of sitting on a jury. For example, they may not feel that they are sufficiently educated to sit on a jury because they may not have completed school to year 12. However, if deaf people are told about the role of juries and the breadth of people who become jurors then this will help them gain confidence to sit on juries.
- It will be important to clearly set out what sort of supports are available and what is expected of the juror.
- It could also be noted that there is no need to have a legal background to serve on a jury. Such knowledge cannot be assumed, because deaf people have not been allowed to participate in the past.
- Because the cohort has never had opportunity before they need upskilling/training about what is involved to better inform them when they fill out a questionnaire.⁴⁵
- 18.48 Alastair McEwin commented 'deaf people might not feel confident to do jury duty. Until there is cultural change deaf people will continue to expect less from themselves'.⁴⁶
- 18.49 Della Goswell observed:
- As with the broader population, many deaf people will not understand what is involved in jury duty. They have less access to explanatory information about the role (especially from a deaf person's perspective). If deaf people become entitled to be considered for jury service, then it will be helpful to have a community education program/resources in Auslan that explain what is involved, the English literacy skills needed, that they can choose to participate if they feel confident, but that they can also request to be excused if they fear that they will be out of their depth.⁴⁷
- 18.50 Deaf Victoria consultation participants explained:
- Deaf people will require training or educating as well, to help build their confidence to contribute as a jury member. There may be some cultural differences that will need to be unpacked and understood.⁴⁸
- 18.51 We recommend that people from the subject groups have access to clear information about what adjustments are available to allow them to serve as jurors, and what they can expect to happen throughout the process. Information should be provided about all matters that will affect them, including:
- the need for a good understanding of English
 - how to notify Juries Victoria that they require an adjustment to serve as a juror
 - examples of reasonable adjustments
 - the importance of having a discussion with Juries Victoria about adjustment needs
 - options to be excused or have service deferred, with examples of common scenarios
 - options to visit court ahead of jury empanelment to familiarise themselves with the courtroom and court building and to discuss adjustments
 - the assessment process and what that will involve—who will make decisions and the opportunity for the person to express their needs to Juries Victoria and the court, the possibility of not being able to serve if fair trial issues arise or adjustments are deemed unreasonable

⁴⁵ Consultation 5 (Expression Australia).

⁴⁶ Consultation 24 (Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity).

⁴⁷ Consultation 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

⁴⁸ Consultation 6 (Deaf Victoria and community participants).

- what will be expected of them at trial if they are selected on a jury
 - information about the responsibilities that support persons and Auslan interpreters owe to the court
 - the role of an accessibility officer
 - who to contact if they need to talk to someone about jury service.
- 18.52 We recommend that this information be provided on the Juries Victoria and court websites. Disability advocacy groups could also distribute information about the reforms to their communities via newsletters or information sessions.
- 18.53 The ACT *Jury Handbook* includes a section on 'Reasonable Support for Jurors'.⁴⁹ This is publicly available on the website of the ACT courts. Public information explains how HMCTS supports court users with disabilities in England and Wales.⁵⁰
- 18.54 Juries Victoria should consider developing a short information video, information sheet or 'Q and A' about jury service with adjustments in accessible formats.
- 18.55 Information should be provided in accessible formats in line with *Australia's Disability Strategy 2021–2031*, which requires 'accessible legal information and advice to facilitate equal and effective participation in all legal proceedings'.⁵¹
- 18.56 We commend the Supreme Court and the County Court for already aiming to provide websites that are accessible to the 'widest possible audience', including 'readers using assistive technology or accessibility features'.⁵² The Supreme and County Court websites conform to level AA Accessibility.⁵³ The County Court website is also in line with the Victorian Government's Digital Standards.⁵⁴
- 18.57 It would be helpful if Juries Victoria could arrange a disability liaison officer in its office to be available for people in the subject groups to call (or video call, with the assistance of an Auslan interpreter, if required) with whom they can discuss their needs and any reservations about serving.

Education should be targeted to encourage Aboriginal people to serve on juries

*As Aboriginal people, we often see ourselves as victims of the court system. But we're also members of the community and need to be part of the justice system by serving on juries.*⁵⁵—Victorian Aboriginal Community Controlled Health Organisation consultee

- 18.58 Targeted information encouraging Aboriginal Victorians in the subject groups is also important.⁵⁶ As outlined in Chapter 4, Aboriginal consultation participants advised us that Aboriginal members of the subject groups may feel additional hesitation to serve.⁵⁷ The Victorian Aboriginal Controlled Health Organisation (VACCHO) referred to layers of institutional discrimination on the basis of race and disability that act as barriers to jury service.⁵⁸

49 Supreme Court of the Australian Capital Territory, *Jury Handbook* (Handbook, 12 June 2019) 10.
50 Email from Live Services Team, Strategy and Change Directorate, Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 2 September 2021; Her Majesty's Courts and Tribunals Service, 'Equality and Diversity', *GOV.UK* (Web Page) <<https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/equality-and-diversity>>.
51 Department of Social Services (Cth), *Australia's Disability Strategy 2021–2031* (Report, December 2021) 17, Policy Priority 5.
52 'Accessibility', *County Court of Victoria* (Web Page) <<https://www.countycourt.vic.gov.au/accessibility>>; 'Accessibility', *The Supreme Court of Victoria* (Web Page) <<http://www.supremecourt.vic.gov.au/accessibility>>.
53 *Web Content Accessibility Guidelines 1.0* (Web Page, 18 May 2021) <<https://www.w3.org/TR/WAI-WEBCONTENT/>>.
54 'Accessibility', *County Court of Victoria* (Web Page) <<https://www.countycourt.vic.gov.au/accessibility>>; Victorian Government, 'Digital Guides', *VIC.GOV.AU* (Web Page) <<https://www.vic.gov.au/digital-guides>>.
55 Consultation 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)).
56 The QLRC similarly recommended that 'culturally appropriate educational programs that promote the importance and benefits of jury service should be developed and made available within Indigenous communities': Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) v. Recommendation 11–4.
57 Consultation 23 (Victorian Aboriginal Community Controlled Health Organisation (VACCHO)).
58 Ibid.

- 18.59 VACCHO advised the Commission that the success of legal reforms 'could be improved if there were champions within the Aboriginal community'.⁵⁹ VACCHO further advised that many Aboriginal people work in the court system now, and suggested that they become involved, 'to educate the community and help encourage Aboriginal people to serve'.⁶⁰ For example, Aboriginal community leaders or Aboriginal people who work in the court system could take groups of people into court to see a jury working and speak with a judge to 'make the system more humanised'.⁶¹ Educational tools such as a video could be created to educate Aboriginal people about the importance of jury service.⁶²
- 18.60 The Victorian Government should consult with Aboriginal leaders, including via the Aboriginal Justice Caucus, about the best way to ensure culturally appropriate and targeted information about the new laws reaches the Indigenous community. This may include funding VACCHO and the Victorian Aboriginal Legal Service (VALS) to provide education about the new laws through its networks.
- 18.61 It might also be helpful for Juries Victoria to create an Internal Aboriginal liaison role. The liaison person could disseminate information about the new laws, educate people of the importance of their service and act as a contact point to explain the new laws if an Aboriginal person from the subject groups was summonsed to serve.

Recommendations

48. Information about the new laws and policies should be widely distributed to the Victorian community in accessible formats, including videos, printed information by Government and advocacy organisations, and on the Juries Victoria and court websites.
49. The Victorian Government should consult with the Aboriginal Justice Caucus, Victorian Aboriginal Community Controlled Health Organisation and Victorian Aboriginal Legal Service about the best way of ensuring culturally appropriate information reaches the Aboriginal community to encourage Aboriginal people from the subject groups to serve on Victorian juries.

59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.

CHAPTER 19

Funding reforms and monitoring implementation

220 Overview

220 Funding reforms

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19. Funding reforms and monitoring implementation

We will improve the collection and use of data about people with disability across government to better inform evidence-based policy and programs and strengthened outcomes reporting.¹—Victorian State Disability Plan 2022–2026

Overview

- There will be funding costs associated with implementing the recommendations in this report. However, the personal and community benefits that flow from reform outweigh the associated costs.
- Juries Victoria and the courts should collect data about the participation of people from the subject groups in the jury system, both during the selection process and in trials, if they are selected as jurors.
- Subject to juror confidentiality requirements, information should also be collected about the experiences of people from the subject groups.
- This data will assist with the review of new laws, policies and procedures, to check how well they are enabling people in the subject groups to serve as jurors, and to identify where improvements can be made.
- Data should be published in the Supreme Court annual report.
- The new laws should be reviewed after five years of operation, to ensure that they are meeting their policy objectives.

Funding reforms

Adequate funding is critical for success with these reforms.²
—Law Institute of Victoria

Likely costs associated with reform

- 19.1 Funding will be needed to implement the reforms recommended in this report, especially to:
- provide reasonable adjustments
 - provide disability awareness training for the judiciary, Juries Victoria and legal professionals

- prepare training materials about new laws and internal operational guidelines
 - update court and Juries Victoria websites with clear information about the operation of new laws for the community
 - train new accessibility officers who will provide logistical assistance to jurors from the subject groups
 - collect and analyse data about the implementation of new laws
 - improve the accessibility of Victorian courtrooms and buildings
 - promote new laws amongst the subject groups and the Aboriginal community.
- 19.2 Juries Victoria and the courts should be funded to provide reasonable adjustments as required. The courts have existing obligations to make reasonable adjustments for anyone in the subject groups who is working in or receiving a service from the court.³ The costs to enable inclusive juries should be viewed in the context of those existing obligations.
- 19.3 It is likely that the highest ongoing costs associated with the provision of adjustments will be for Auslan interpreters, Communication Access Real Time Technology (CART) and stenographers. A minimum of two interpreters will be required for court work and three for a long trial or to cover breaks (any duration longer than one hour will involve interpreters working together in tandem). Complex cases might also require some preparation and briefing time, with associated costs. Additional travel payments may be required for regional cases, non-metropolitan areas, and more outlying metropolitan locations, or cases where an interpreter is located regionally.⁴
- 19.4 In Chapter 14 the Commission recommended that the Courts and Juries Victoria pay Auslan interpreters who undertake jury work at a rate that is commensurate with the skill required to perform the role, and at a level that will retain and attract Auslan interpreters to do this type of work.

Concerns expressed about the cost of reform

- 19.5 The County Court anticipated significant costs associated with reform, noting:
- The Court anticipates the need for significant funding for modifications and running costs. The Court is not able to make all necessary accommodations and does not possess the required equipment. Support people will need to be employed, trained, and assessed. Juries Victoria, judicial registrars and court lawyers would need to be supported to allow for assessments and identification of matters suitable or not suitable as accessible trials. There may be other educative costs associated with the training of other court users. ... A cost-effective way to achieve this may be to pool resources between the two trial courts ... The Court anticipates the costs in regional areas to be greater than in Melbourne.⁵
- 19.6 In the case of *JH v Australia* before the United Nations Committee on the Rights of Persons with Disabilities (Convention Committee), Australia submitted that there would be 'significant costs' associated with providing reasonable adjustments for jurors. In making this claim, Australia referred to a 2016 study which examined the use of interpreters in the court system in Monroe County, New York State, and reported 'significant cost involved in having interpreters (approximately US\$300,000 annually, including US\$100,000 for ASL interpreting)'.⁶
- 19.7 The Commission notes in Chapter 10 that Monroe County in New York State has a large population of American Sign Language users because the National Technical Institute for the Deaf is located in the city of Rochester. Approximately six American Sign

3 See Judicial College of Victoria, *Disability Access Bench Book* (Online Manual, 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

4 Information provided by Expression Australia to the Victorian Law Reform Commission, 20 October 2020.

5 Submission 14 (County Court of Victoria).

6 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 9 [4.1.2]; Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016*, 20th sess, UN Doc CRPD/C/20/D/35/2016 (31 August 2018) [4.7] (*JH v Australia*). We note that these estimated annual costs are for Monroe County Court, Rochester, New York State: Information provided by Jemina Napier to Victorian Law Reform Commission, 28 June 2022.

Language users are empanelled each year⁷ and the court schedules one deaf juror for jury selection every week, but not all progress to jury service.⁸ The numbers in Victoria are likely to be significantly less, with an estimated population of approximately 30,000 Auslan users in Australia, out of a total population of almost 26 million (of which Victoria has a population of around 6.56 million).⁹

- 19.8 The New South Wales Law Reform Commission concluded that the cost of permitting deaf persons to serve on a jury 'as a proportion of the total cost of court administration is marginal and therefore no cause for concern'.¹⁰ It further concluded that the costs for enabling blind people to serve would similarly 'likely be minimal'.¹¹

The benefits outweigh the costs of reform

- 19.9 Most community responses acknowledged that there would be costs involved with reforms. However, the majority view was that these costs would be outweighed by the benefits to people from the subject groups and to the justice system more broadly.¹²

- 19.10 Many noted that the benefits would be shared by all users of the Court and the community. For example, Victoria Legal Aid noted:

While we are not providing specific suggestions or commenting on the costs of the changes, we note the broader need and social benefit of technological enhancements, such as hearing loops. Adjustments are needed and will benefit people who are hearing and vision impaired as well as judges, lawyers, parties to proceedings and witnesses.¹³

- 19.11 Similarly, Associate Professors Bruce Baer Arnold and Wendy Bonython commented:

Anxieties about administrative costs or inconvenience are overstated. It is unlikely that insupportable numbers of people who are deaf, hard of hearing, blind or have low vision will seek to participate in juries under the Victorian justice system, but it is important that they are not arbitrarily denied the right to participate fully in public life if they wish to. The costs associated with their inclusion are appropriate costs. They are consistent with public/private sector investment to foster individual and collective flourishing by removing barriers to participation in public life or self-fulfilment, and are comparable with financial obligations imposed by law on private sector actors to protect participation by people with disability in the areas of employment, education, and other aspects of life. [...]

We respectfully suggest that a strong focus on the costs associated with reforming the law is inappropriate. Expenditure to facilitate inclusion and to broaden community understanding is a legitimate investment, in the same way that there were costs associated with the reform of law to address gender and other discrimination. Inclusion is a matter of justice, the foundation of the state's court system. It is also an enabler of increased productivity across the state/national economy.¹⁴

- 19.12 Vision Australia observed that the 'cost of providing reasonable supports could be minimised by utilising existing employee resources in the court system, supplemented by the provision of additional training'.¹⁵

7 Jemina Napier et al, 'Training Legal Interpreters to Work with Deaf Jurors' in Jeremy L Brunson (ed), *Legal Interpreting—Teaching, Research and Practice* (Gallaudet University Press, 2022).

8 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

9 'Disability Statistics', *Australian Network on Disability* (Web Page, 15 November 2019) <<https://www.and.org.au/resources/disability-statistics/>>; 'National, State and Territory Population', *Australian Bureau of Statistics* (Web Page, 28 June 2022) <<https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>>. Data correct as at 31 December 2021.

10 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 36 [2.62], citing an assessment by the organisation People with Disability.

11 Ibid 54 [3.17].

12 Submissions 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)), 9 (Madison), 10 (Vision Australia); Consultations 2 (Law Institute of Victoria), 21 (Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, NSW).

13 Submission 8 (Victoria Legal Aid).

14 Submission 4 (Associate Professors Bruce Baer Arnold (University of Canberra) and Wendy Bonython (Bond University)).

15 Submission 10 (Vision Australia).

- 19.13 The Commission agrees that the proposed reforms would deliver substantial benefits which likely outweigh the costs. While the costs are uncertain at present, they are likely to be a small proportion of the total cost of court administration. There will be significant personal benefit to people in the subject groups associated with reform, and the jury system will be more representative, in keeping with the overall purpose of the *Juries Act 2000* (Vic).¹⁶ These are also other important considerations:

If a cost-benefit analysis is even the appropriate yardstick, what is a 'reasonable accommodation' must also factor in the non-economic democratic benefits of the jury system.¹⁷

- 19.14 Funding reform will ensure that Victorian laws and practices comply with the recommendations of the Convention Committee and that the jury system is modernised to better reflect community standards and expectations.

Monitoring the implementation of reforms

- 19.15 It will be important to review the operation of any new laws, policies and procedures to see if they are working to include people from the subject groups on juries. Data collection and analysis will be vital in assessing and improving law and practice.
- 19.16 Australia has an obligation to monitor its implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁸ Collecting data about access to jury service would respond to the recommendations of the Convention Committee in its 2019 Concluding Observations on Australia's compliance (or lack thereof) with the CRPD.¹⁹
- 19.17 Victoria has indicated its commitment to improve the collection of data on accessibility for people with disabilities across government in the new state disability plan.²⁰

Community support for evaluation

- 19.18 The community supported reviewing the effectiveness of new laws.²¹ Associate Professors Bruce Baer Arnold and Wendy Bonython submitted that:
- the Commissioner and Juries Victoria should have a facilitative and oversight role, [...] ensuring that there is qualitative and quantitative reporting regarding implementation of the inclusion strategy.²²
- 19.19 They further suggested that:
- the Attorney-General and the Justice Department report to Parliament and the community at large on an annual basis using comprehensive statistics on the inclusion in juries of people who are deaf, hard of hearing, blind or with low vision.²³

¹⁶ *Juries Act 2000* (Vic) s 1(b).

¹⁷ Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 35–36.

¹⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 33.

¹⁹ The Committee recommends that the State party, in close consultation with persons with disabilities, through their representative organisations, ensure effective access to justice for persons with disabilities, without any discrimination. It also recommends that the State party '(g) Collect data disaggregated by disability, age, gender, location and ethnicity at all stages of the criminal justice system, including on the number of persons unfit to plead who are committed to custody in prison and other facilities': Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) 17 [26](g), art 13.

²⁰ Department of Families, Fairness and Housing (Vic), *Inclusive Victoria: State Disability Plan 2022–2026* (Report, March 2022).

²¹ See, eg, Submission 3 (Youth Disability Advocacy Service).

²² Submission 4 (Baer Arnold & Bonython).

²³ *Ibid.*

- 19.20 The recommendation to collect this data was supported by the Castan Centre, which referenced the *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (see Chapter 6).²⁴ Principle 7.1 requires states to ensure that persons with disabilities are able to act as jurors without discrimination. Principle 7.2(e) requires governments and courts to:

Collect disaggregated data on the participation of persons with disabilities in the justice system and, using that data, develop and implement strategies to reform policies, practices and laws to ensure equal access to justice.²⁵

- 19.21 We were told by the Jury Commissioner, New York State Courts in Rochester, Monroe County, United States, that his office is 'trying to improve data tracking so that the office records how many people serve with supports'.²⁶

Collecting and publishing data about the operation of new laws

- 19.22 Juries Victoria is best placed to coordinate the collection of data about the implementation of reform because it is responsible for the administration of the Victorian jury system and is in regular contact with jurors.
- 19.23 Juries Victoria includes some information about Melbourne and regional Victoria in the Supreme Court annual report, regarding:
- how many people are randomly selected
 - how many people are summonsed
 - the number of jury trials.²⁷
- 19.24 The additional information set out in Table 1 should be collected by Juries Victoria or the courts. It should be collated and analysed by Juries Victoria and published with other data about jury selection and jury trials that already appears in the Supreme Court's annual report.
- 19.25 This will ensure that information about the implementation of reforms is in the public domain, enabling the community to campaign for further change if needed. Transparency will assist to build public confidence in the justice system.
- 19.26 Depending on the outcomes of data analysis, further legal or policy reforms may be required. For example, there may be a need for measures to encourage Aboriginal people from the subject groups to serve. This is significant given the additional barriers Aboriginal people may face, as discussed in detail in Chapter 4.²⁸

24 Submission 12 (Castan Centre for Human Rights Law, Monash University); United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Human Rights Special Procedures, Special Rapporteur on the Rights of Persons with Disabilities, August 2020).

25 United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Human Rights Special Procedures, Special Rapporteur on the Rights of Persons with Disabilities, August 2020) 22 [7.1], [7.2](e) Principle 7.

26 Consultation 14 (Jury Commissioner, New York State Courts in Rochester, Monroe County, United States).

27 Supreme Court of Victoria, *Annual Report 2019–2020* (Report, March 2020) 9, 63.

28 Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) Recommendation 11–5.

Table 1: What data about participation on juries by people from the subject groups should be collected?

What data should be collected?	Who should be responsible for collecting the data?
Types of disability identified in response to summons	Juries Victoria
If potential jurors identify as Aboriginal or Torres Strait Islander	Juries Victoria
What adjustments are provided during jury selection processes	Juries Victoria
The number of Auslan bookings made by Juries Victoria for jury selection and jury service including the number of interpreters and the duration of interpreting	Juries Victoria
The number of times the Juries Commissioner exercises the new own motion power to defer jury service for a person in the subject groups	Juries Victoria
The number of times the Juries Commissioner exercises the new power to hold a person's ballot card out of a ballot for a panel where the trial will be heard in a courtroom that cannot accommodate reasonable adjustments or where the Juries Commissioner assesses that the trial is not suitable for the potential juror	Juries Victoria
<p>The number of times people seek to be excused from jury duty and:</p> <ul style="list-style-type: none"> at what stage of the selection process this occurs the nature of their disability why they sought to be excused (inadequate adjustments available, did not feel comfortable serving etc) 	Juries Victoria
The number of times judges exercise their discretion not to allow a person to serve on a jury, or otherwise exclude them, and the reasons provided	The courts
The number of people who request adjustments to serve and are challenged from jury selection through peremptory and stand aside challenges	Juries Victoria
If people are selected on trials, the length and nature of the trials and the adjustments provided	The courts
Survey data about experiences of the jury selection process and serving as a juror with adjustments (see below)	Juries Victoria

Juries Victoria should survey jurors about their experiences

- 19.27 It would also be valuable to collect qualitative data about people's experiences of the jury selection process and serving as a juror with adjustments.
- 19.28 The Juries Commissioner has recommended that user satisfaction of the jury system be assessed to complement the courts' adoption of the 'International Framework for Court Excellence', which looks at a range of performance measures, including user satisfaction.²⁹
- 19.29 We understand that the Juries Commissioner conducted a feedback survey in 2021 regarding user experiences of the online juror orientation program.³⁰ The online program was implemented in response to the coronavirus (COVID-19) pandemic and aims to replicate online the in-person orientation normally given to those attending jury service.³¹
- 19.30 Subject to considerations about juror obligations of confidentiality,³² Juries Victoria should develop a survey to distribute to people from the subject groups, seeking feedback on their experiences.³³ This feedback could be used to improve laws and procedures and be incorporated into professional and judicial training.

Reviewing new laws after five years of operation

- 19.31 The Act should include a mechanism that requires the new laws to be reviewed by the Attorney-General after they have been in operation for five years. A report on the outcome of the review should be tabled in each House of Parliament within 12 months of the review.
- 19.32 A review will ensure that the policy objectives of the new provisions remain valid and that timely amendments can be made to the *Juries Act 2000* (Vic) (the Act). It will also provide an opportunity to consider the matters discussed earlier in this report, including:
- whether Juries Victoria and the courts are keeping up with technological advances and whether any other examples of adjustments need to be included in the Act
 - whether to expand the application of the Act to include jurors whose primary language is other than English
 - whether members of the subject groups are being challenged peremptorily or stood aside and thus being prevented from serving at all
 - assessing the implications of significant rulings or appeal judgments arising from the reforms
 - whether relevant agencies are complying with their policy and training obligations.

29 Paul Anthony Dore, *To Develop a Systemic Approach to Juror Support Programs in Australia* (Report, Winston Churchill Trust, 2018)

30 See also 'International Framework for Court Excellence', *International Consortium for Court Excellence* (Web Page, 25 May 2020) <<https://www.courtexcellence.com>>.

31 Information provided by Juries Victoria to Victorian Law Reform Commission, 20 September 2021.

32 Ibid.

33 *Juries Act 2000* (Vic) pt 10 s 78.

The power to enable Juries Victoria to do this is contained in: ibid 78(3)(a)(ia).

Recommendations

50. Juries Victoria and the courts should collect disaggregated data about people from the subject groups who are summonsed to be in the jury pool and those who go on to serve. Data should be collected at each stage of the jury selection process and in relation to relevant aspects of trials. It should cover at a minimum:
 - types of disability
 - whether potential jurors identify as Aboriginal or Torres Strait Islander
 - adjustments sought
 - adjustments provided including duration of Auslan interpreting
 - the number of times the Juries Commissioner exercises the new powers to hold a person's card out of a ballot
 - the number of times the Juries Commissioner exercises the new power to defer jury service for a person in the subject groups to arrange adjustments
 - why people excused from jury duty could not serve
 - the number of times judges exercise their discretion not to allow a person to serve on a jury, or otherwise exclude them
 - the number of times people who request adjustments are challenged from jury selection
 - length and nature of trials
 - experiences of the jury selection process and serving as jurors with adjustments.
51. Subject to the confidentiality requirements of section 78 of the Juries Act, Juries Victoria should obtain qualitative data by surveying jurors from the subject groups about their experiences.
52. Juries Victoria should collate, analyse and report the data in the annual report of the Supreme Court.
53. The Attorney-General should review the new provisions in the Juries Act five years from the date of commencement, to determine whether the policy objectives of the new provisions are being met and whether any amendments to the Act are needed. A report on the outcome of the review should be tabled in each House of Parliament within 12 months of the review.

Appendices

230 Appendix A: Submissions

231 Appendix B: Consultations

Appendix A: Submissions

Position Statement

- 1 Blind Citizens Australia, 2007, submitted in response to the consultation paper

Submissions

- 2 Dr David Squirrell
- 3 Youth Disability Advocacy Service
- 4 Associate Professors Bruce Baer Arnold, Canberra Law School, University of Canberra
and Wendy Bonython, Faculty of Law, Bond University
- 5 Name withheld
- 6 Mount Alexander Shire Disability Advocacy Group
- 7 Law Institute of Victoria
- 8 Victoria Legal Aid
- 9 Madison (surname withheld)
- 10 Vision Australia
- 11 Supreme Court of Victoria
- 12 Castan Centre for Human Rights Law, Monash University
- 13 Juries Victoria
- 14 County Court of Victoria

Appendix B: Consultations

- 1 Blind Citizens Australia
- 2 Law Institute of Victoria
- 3 Academics: Professor Jemina Napier (Heriot-Watt University), Professor Sandra Hale (University of New South Wales), Associate Professor Mehera San Roque (University of New South Wales)
- 4 Victorian Criminal Bar Association (Barristers, Jim H Shaw and Amanda J Burnnard)
- 5 Expression Australia
- 6 Deaf Victoria and community participants
- 7 Vision Australia
- 8 Brent Phillips
- 9 Consultation with two Victorian County Court Judges, Court policy staff and two Associates
- 10 Juries Victoria
- 11 Consultation with a Judge, a Tipstaff and Court policy staff, Victorian Supreme Court
- 12 Consultation with Victorian County Court Registrars and Court policy staff
- 13 National Accreditation Authority for Translators and Interpreters
- 14 Jury Commissioner, New York State Courts in Rochester, Monroe County, United States
- 15 Representatives of the High Court and District Courts of New Zealand
- 16 Office of Public Prosecutions Victoria
- 17 Youth Disability Advocacy Service
- 18 Australian Sign Language Interpreters' Association, Victoria and Tasmania
- 19 Australian Institute of Interpreters and Translators
- 20 Victorian Equal Opportunities and Human Rights Commission
- 21 Della Goswell, Lecturer, Convenor Auslan-English Interpreting Program, Macquarie University, New South Wales
- 22 Daniel Stubbs, Victorian Disability Worker Commissioner, in his personal capacity
- 23 Victorian Aboriginal Community Controlled Health Organisation
- 24 Alastair McEwin AM, Royal Commissioner, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in his personal capacity
- 25 Peter Ward, Partner, Galbally and O'Bryan Lawyers
- 26 Consultation with Her Majesty's Courts and Tribunals Service, London
- 27 Australian Capital Territory Sheriff and Sheriff's Office, Supreme Court Australian Capital Territory
- 28 Michael Ward, National Coordinator of Audio Description, Vision Australia
- 29 Will McRostie, Service Coordinator, Description Victoria

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* *Community law reform project.*

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Inclusive Juries — Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision

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